...me Court, U.S.
F I L E D

96 276 AUG 19 1996

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

DALE R. RIZZI,

Petitioner,

v.

UNDERWATER CONSTRUCTION CORPORATION,

Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

David A. Kelly, Esq.
Montstream & May
655 Winding Brook Drive
Glastonbury, CT 06033-6087
(860) 659-1341

Counsel for Petitioner

112 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit err in deciding that the Longshore and Harbor Workers' Compensation Act does not apply to an injured worker who is submerged under water at the time of his injury but that the waters have become non navigable before flowing through the site of the injury?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. Decision of the Court of Appeals in this Case Is in Direct Conflict with the Decision of the Circuit Court of Appeals for the Ninth Circuit as Expressed in the Morrison Knudsen Co. V. O'Leary, 288 F. 2nd 542 (9th Cir. 1961)	5
II. The Sixth Circuit's Decision to Affirm the Benefits Review Board Endorses the Benefit Review Board's Failure to Follow the Appropriate Standard of Review	6
CONCLUSION	8
APPENDIX	10

TABLE OF AUTHORITIES

Cases — Page

LePore vs. Petro Concrete Structures, Inc.,
23 BRBS 403 (1990). 4, 6

Morrison Knudsen Co. V. O'Leary
288 F. 2nd 542 (9th Cir. 1961) 5

O'Keefe v. Smith, Hinchman & Grylis Assoc. 6
380 U.S. 359 (1965)

Willow River Power Co. v. U.S. 6
101 CT. CL 222 (1944)

Other Authorities

S. Rep. 13, H.R. Rep. 10-11, U.S. Code Cong. and
Admin. News 1972 5

OPINIONS BELOW

Decision of Administrative Law Judge David W. DiNardi, dated June 23, 1990: Rizzi v. Underwater Construction Corporation.; (Case No. 89-LHC-3118, OWCP No. 10-27319).

Decision and Order of the Benefits Review Board, United States Department of Labor, dated January 31, 1994: Rizzi v. Underwater Construction Corporation.; (Case No. 90-2346A, 27 BRBS 273)

Decision and Order on Reconsideration of the Benefits Review Board, United States Department of Labor, dated November 15, 1994: Rizzi v. Underwater Construction Corporation.; (28 BRBS 360 (1994), BRB No. 90-2346A.)

Decision of the United States Court of Appeals for the Sixth Circuit, Rizzi v. Underwater Construction Corporation.; Case No. 95-3034, decided and filed May 21, 1996.

STATEMENT OF JURISDICTION

This case arose under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. Administrative Law Judge of the United States Department of Labor was authorized under the Longshore Act to hear the claim and, as specified under said Act, the Benefits Review Board had jurisdiction to review the Administrative Law Judge's Award.

The United States Court of Appeals for the Sixth Circuit had jurisdiction to hear the appeal from the Benefits Review Board pursuant to Section 921(c) of the Longshore Act. Decision of that Court was rendered on May 21, 1996.

This Court has jurisdiction to review the decision of the Court of Appeals for the Sixth Circuit by way of certiorari under 28 U.S.C. Section 1254.

STATUTORY PROVISIONS

33 U.S.C. Section 903(a):

Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

Mr. Rizzi seeks to be covered under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. (Longshore Act). Mr. Rizzi suffered a devastating injury which arose out of and in the course of his employment with Underwater Construction Corporation. As a result of this injury, he was in a coma for several months and is left with serious permanent disability to the brain and lungs. At the time of the injury, Mr. Rizzi was submerged under water. Underwater Construction Corporation is in the business of using divers to make various repairs to power plants, piers and other facilities.

Mr. Rizzi's claim was heard by an Administrative Law Judge, David W. DiNardi, of the United States Department of Labor. Judge DiNardi issued his decision June 23, 1990 stating, "that although the claimant was not directly in the Great Miami River, he was within a channel of water which flowed from the Great Miami River through this Champion International Reservoir underneath its factory and then back into the GMR". He further found that the site of the accident was immediately adjacent to the navigable waterway. Further, Judge DiNardi found that Mr. Rizzi should be covered under the "twilight zone" wherein Longshore jurisdiction will be more liberally interpreted if the State jurisdiction is not extended. Further, Judge DiNardi found that the "overall employment" test led to his holding that Longshore jurisdiction attached.

Employer requested review before the Benefits Review Board of the United States Department of Labor. The Board

issued its Decision and Order dated January 31, 1994 reversing the Administrative Law Judge. The Board held that the Administrative Law Judge erred in focusing on the navigability of the Great Miami River. It went on to state that the waterway area where the accident occurred had lost its navigability. They substituted their own facts when they stated "the facts of the instant case are similar to those addressed by the Board in the LePore vs. Petro Concrete Structures, Inc., 23 BRBS 403 (1990)" and went on to deny coverage.

The claimant requested reconsideration of the Benefits Review Board judgment and on November 5, 1994, the Board denied reconsideration.

Claimant requested review before the United States Court of Appeals for the Sixth Circuit. In an opinion written by Chief Judge Merritt, the decision of the Benefits Review Board was affirmed.

The Court of Appeals held that "we agree with the Board that a navigable waterway ends where underground pipes and vents remove water from a river to a reservoir or tank for manufacturing or storage purposes. Otherwise, river water pumped into municipal reservoirs and similar facilities would continue to be viewed as navigable waters even though transportation is no longer possible. Like drains and small creeks, such reservoirs are too far removed from navigation to be any longer considered 'navigable waterways' even under a liberal construction." (Quotation marks in original)

Petitioner now seeks the review of this Honorable

Court.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals in this Case Is in Direct Conflict with the Decision of the Circuit Court of Appeals for the Ninth Circuit as Expressed in the Morrison Knudsen Co. V. O'Leary, 288 F. 2nd 542 (9th Cir. 1961).

In Morrison-Knudsen it was held that Longshore jurisdiction attached to an artificial tunnel that had diverted water during the course of a construction project on the Snake River. At the time of the accident, the only water in the area came from leakage around barriers designed to stop the flow.

The Benefits Review Board and the Sixth Circuit in the instant case seem to feel that the water in this case was navigable prior to flowing into the site of the accident and probably navigable upon flowing back into the river but non navigable at the site of the accident.

No standards were expressed to determine when and at what point the water loses its navigability. This problem is left for future claimants to navigate.

The intent of Congress when it expanded jurisdiction with the 1972 Amendments was to avoid the problem where claimants would walk in and out of coverage during the course of their working day. (S. Rep. 13 H.R. Rep. 10-11, U.S. Code Cong. & Admin. News 1972) To follow the new approach

outlined in this case is in conflict with the intent of Congress and the clear direction expressed in the Morrison Knudsen Co. V. O'Leary case.

In light of this conflict, we ask the Supreme Court to resolve it.

II. The Sixth Circuit's Decision to Affirm the Benefits Review Board Endorses the Benefit Review Board's Failure to Follow the Appropriate Standard of Review.

The Benefits Review Board must affirm a decision if the findings of an Administrative Law Judge are supported by substantial evidence in the record as considered as a whole, if they are rational and if the decision is in accordance with the law. O'Keefe v. Smith, Hinchman & Grylis Assoc., 380 U.S. 359 (1965).

Furthermore, whether or not a stream is navigable is a question of fact. Willow River Power Co. v. U.S., 101 CT. CL 222 (1944). Reversed on other grounds 324 U.S. 499.

However, even in light of the fact sensitive nature of the inquiry, Benefits Review Board not only ignores the factual findings by the trial judge but goes forward and substitutes its own set of facts when they state "the facts of the instant case are similar to those addressed by the Board in LePore v. Petro Concrete Structures, Inc., 23 BRBS 403 (1990)." They then go on to describe at length the factual circumstances of the LePore case.

The Board finds that the facts of the LePore case are similar to that of the Rizzi case (erroneously) and then issue the holding that the Longshore Act does not apply. Though the trial judge found that the water rushed in and out of the area where the accident occurred and that the claimant was subjected to the hazards of a maritime environment, the Benefits Review Board analogized the case to a matter in which the Administrative Law Judge found that the water "seeped" into the site of the accident.

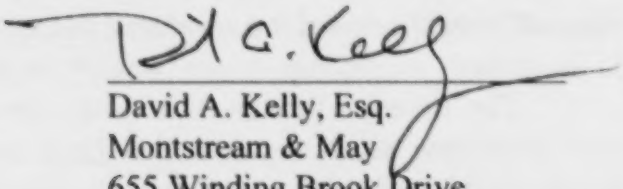
The Benefits Review Board has clearly substituted their own new set of facts to the Rizzi case and this is impermissible and error.

This issue was raised to the Sixth Circuit. The Sixth Circuit dismisses this argument with the statement "The Board's reversal of the ALJ's decision order rests upon its **finding** that the site of the claimant's injury did not constitute navigable waters as covered by 33 U.S.C. 902 (3)." (Emphasis supplied) The Board is not entitled to make findings of fact in its review. It is error for the Sixth Circuit to not reverse this impermissible substitution of facts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,



David A. Kelly, Esq.
Montstream & May
655 Winding Brook Drive
Glastonbury, CT 06033-6087
(860) 659-1341
Counsel for Petitioner

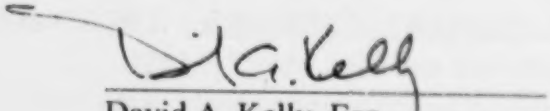
CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel/parties of record this 14th day of August, 1996, as follows:

Scott Wilson Williams, Esq.
Maher & Williams
P. O. Box 550
Fairfield, CT 06430-0550

Solicitor General of the United States
Department of Justice
10th Street and Constitution Avenue N.W., Room 5614
Washington, DC 20530

Michael Hertzig, Esq.
U. S. Department of Labor
Solicitor's Office
200 Constitution Avenue, N.W., Suite S-4325
Washington, DC 20210



David A. Kelly, Esq.
Montstream & May
655 Winding Brook Drive
Glastonbury, CT 06033-6087
(860) 659-1341

APPENDIX A

Page

Decision of Administrative Law Judge David W. DiNardi, dated June 23, 1990: Rizzi v. Underwater Construction Corporation.; (Case No. 89-LHC-3118, OWCP No. 10-27319) 11

Decision and Order of the Benefits Review Board, United States Department of Labor, dated January 31, 1994: Rizzi v. Underwater Construction Corporation.; (Case No. 90-2346A, 27 BRBS 273) 76

Decision and Order on Reconsideration of the Benefits Review Board, United States Department of Labor, dated November 15, 1994: Rizzi v. Underwater Construction Corporation.; (28 BRBS 360 (1994), BRB No. 90-2346A.) 90

Decision of the United States Court of Appeals for the Sixth Circuit, Rizzi v. Underwater Construction Corporation.; Case No. 95-3034, decided and filed May 21, 1996. 99

U.S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

In the Matter of:

DALE R. RIZZI, Claimant
against
UNDERWATER CONSTRUCTION CORP., Employer
and
Liberty Mutual Insurance Company, Carrier

Case No.: 89-LHC-3118
OWCP No.: 10-27319

David A. Kelly, Esq., For the Claimant

Kathleen M. Byrne, Esq.
Scott W. Williams, Esq., for the Employer/Carrier

Before: David W. DiNardi, Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. § 901, et seq.), herein referred to as the "Act." The hearing was held on January 23, 1990 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for

the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post hearing evidence has been admitted as:

EXHIBIT NO.	ITEM	FILING DATE
CX 25	Attorney Kelly's letter filing the	2/7/90
CX 26	January 23, 1990 letter of J. Thomas Wheeler to Attorney Kelly identifying the Carrier's adjuster who visited Claimant in the hospital on April 10, 1987	2/7/90
RX 1	Attorney Powers' letter filing the	3/26/90
RX 2	Deposition of Testimony of Patrick H. Carigan, and	3/26/90
RX 3	Matthew P. Zerbe	3/26/90
ALJ EX 5	This Court's Notice sending to Attorney Kelly copies of RX 2 and RX 3 as apparently this Court was served copies intended for Attorney Kelly	3/26/90

ALJ EX6	This Court's Notice sending to Attorney Kelly and Attorney Williams copies of CX 23 and CX 24	4/12/90
CX 27	Attorney Kelly's letter filing	4/16/90
CX 28	Deposition Testimony of J. Thomas Wheeler and twenty-three photographs of the Great Miami River in the vicinity of Hamilton, Ohio, and	4/16/90
CX 29	Transcript of the attempted deposition Dale Gurr (a witness who as a "no-show")	4/16/90
CX 30	Attorney Kelly's letter filing	4/23/90
CX 31	Claimant's brief	4/23/90
RX 4	Respondents' brief filed by Attorney Byrne	4/23/90
ALJ EX 7	This Court's Notice directing the filing of additional pleadings	4/26/90
CX 32	Attorney Kelly's letter filing	5/14/90
CX 33	Claimant's response	5/14/90
RX 5	Respondents' Motion for Extension of Time	5/29/90

RX 6	Copy of Attorney Williams' letter to Compensation Commissioner Arcudi	6/1/90
RX 7	Respondents' Supplemental Memorandum of Law	6/6/90
CX 34	Attorney Kelly's letter timely objecting to Respondents' motion	6/8/90
ALJ EX 8	This Court's denial of Claimant's objections to Respondents' motion, and Claimant was given ten days to days to file a response to Respondents' memorandum	6/8/90
RX 8	Respondents' supplemental memorandum	6/18/90
CX 35	Claimant's response to ALJ EX 8	6/20/90

The record was closed on June 20, 1990.

Stipulations and Issues

The parties stipulate, and I find:

1. Claimant and the Employer were in an employee-employer relationship at the relevant times.

2. Claimant alleges that he suffered an injury in the course and scope of his employment on January 20, 1987.

3. The Employer had immediate notice of the injury.

4. The claim for compensation is dated December 12, 1987 and the Respondents' notice of controversion is dated January 20, 1988.

5. The parties attended an informal conference on June 15, 1989.

6. No benefits have been paid herein.

The unresolved issues in this proceeding are:

1. Whether Claimant satisfies the jurisdictional/coverage requirements of the Act.

2. Causality of any injury to employment.

3. Nature and extent of any disability.

4. Average Weekly Wage.

5. Entitlement to medical benefits, interest and additional compensation pursuant to Section 14(e) of the Act.

Summary of Evidence

Dale R. Rizzi ("Claimant" herein), twenty-eight years of age, with a high school education plus several courses at a community college in Arizona, worked in Atlanta as a laborer in masonry construction and for a firm

engaged in cleaning restaurant equipment. He entered the United States Navy on September 8, 1983 and, upon completion of basic training, immediately started Diving School in Coronado, California, a course which lasted sixteen weeks on an eight-hour daily basis. He was taught SCUBA and diving medicine, first aid, as well as maintenance and repair of diving equipment. After completion of the course he was assigned to the Navy Submarine Base in New London, Connecticut in November of 1984 and had duties of performing underwater work on the submarines, Claimant estimating that fifty (50) percent of his work was performed underwater. Claimant was honorably discharged on September 1, 1986 and he applied for underwater work at several firms as he wanted to continue in that field. However, such work was not available and, about three weeks after his discharge, he began to work as a carpenter-laborer for a construction firm earning $6.00 per hour for a forty (40) hour week. (TR 17-26)

Claimant left that job the latter part of October of 1986 and on October 25, 1986 he was hired as a diver by Glen McEwen (CX 1, item 20) of Underwater Construction Corporation ("Employer"), a firm located in Essex, Connecticut and which specializes in performing underwater various tasks utilizing the services of underwater divers. Claimant's first job was at a nuclear power plan in Lancaster, Pennsylvania where he had the task of "building underwater steel dams in the water channels underneath the (power) plant," work which took about two or three weeks. The power plan was located on a river more than one hundred yards in width; he could not

remember the name of the river. Claimant was paid $6.00 per hour plus $30.00 per diem for every day spent away from Connecticut and $10.00 for every day spent working in Connecticut. After that work was completed Claimant returned to Essex, Connecticut and performed various underwater tasks for the Employer at various sites, including unclogging intake pipes at a nuclear power plant on the Connecticut River at Haddam, Connecticut. Claimant saw various type vessels on the Connecticut River, such as barges, large ships and pleasure boats. Claimant also did underwater work at several marinas along the Connecticut River. At the Employer's Essex home office claimant did maintenance, repair and rebuilding work on diving equipment and underwater machinery not only used by the Employer but also such equipment sent to the Employer by other firms for such repair and maintenance. The Employer also has offices in Wheeling, West Virginia, Norfolk, Virginia and in Florida. (TR 27-32)

In early January of 1987 Claimant drove a company vehicle and appropriate diving equipment to Wheeling, West Virginia, and he was assigned work in Hamilton, Ohio at a Champion International Company paper making plan located on the banks of the Great Miami River. A reservoir or large tank was located underneath the Champion plant and water from that river was pumped into the reservoir for use in the paper-making process and the water so used was thereupon recycled and discharged through other pipes and returned to the river. Claimant's task was to dive underwater and clean out the silt, debris and mud from the intake pipes. In the performance of that work he had to use a 9 inch cast iron pump which was so

heavy as to require the use of a chainfall to move it and push it into the water, Claimant working in depths of four feet to about twelve feet. Claimant who estimated the pump weighed over 100 pounds used the pump to remove the silt from the reservoir's intake pipes and pumped it back into the Great Miami River (herein "GMR"), a river which Claimant estimated was one hundred feet wide (TR 75-76) and 15 to 20 feet in depth(TR 37) or 20 to 30 feet in depth. (TR 75-76)

In view of its importance, claimant's pertinent testimony on page 37-39 on the nature of his underwater work will be quoted here to put this matter in proper perspective:

Q What was your job in relation to that machine?

A My job was to take the pump, the intake of that pump and pump the silt out of the reservoir back into the river.

Q Now, so this was mud that you were removing?

A Yes. From the river.

Q And it flowed in from the river?

A Yes.

Q Describe for me how deep was the water you

went into?

A Fifteen to 20 feet.

Q How much river mud was in there?

A Twelve to -- from 12 feet to 4 feet.

Q So it was pretty shallow? The water shallow to begin with?

A Yes.

Q Tell me how the job went?

A We started at the shallowest spot of the mud. Pumped the silt out of the shallowest spot, and worked towards the deepest spot, moving the pump towards the deeps -- towards the mud continuously scooping mud into the intake of the pump.

Q When you got to -- did you eventually reach the bottom where the mud stopped?

A Yes.

Q Let me ask you this. So this machine would such the water and mud out of that particular area?

A Yes.

Q Where would the discharge of that pump be.

A We discharged it back into the Miami River.

Q Back into the Miami River?

A Yes.

Q How long were you in Hamilton, Ohio doing this task?

A My recollection of that period of time is vague. I believe I was there several weeks.

Q Would you be in the water eight hours a day.

A I wasn't in the water eight hours a day. Eight hours a day would be beyond, I believe, at that depth go beyond, I believe, at that depth go beyond a diver's -- they would have to spend time in a decompression tank.

Q How much time did you spend in the water?

A Approximately four hours a day.

Q And would you alternate with another diver?

A Yes.

Q What would you do when you were not in the water?

A When I was not in the water, then my job was to keep an eye on the other diver, the head compressor,

to make sure he is okay, all the time constantly. Talk to him every 15 to 20 minutes just to hear his voice. Basically to keep an eye on the other diver.

Q While you were in the water you would be using this pump?

A Yes.

In response to questioning by counsel as to whether he was concerned as to the flow of the GMR, Claimant testified at Page 81:

A We had absolutely nothing to do with the continued running of that river. What we were pumping into the river was -- had little or no effect at all on the river. It was none of our concern.

Claimant testified that he thought or believed he saw some docks or wharves on the GMR in the area in which he was working. He did not see much river traffic as this was the middle of the winter. There were no large piers or docks or dry docks for large vessels; he saw no industrial shipping and could not recall whether or not there were any buoys or navigational lights on the GMR. He saw no loading docks at the Champion plant and the river seemed to be about the same width and depth in the area in which he was working. Claimant worked only inside that reservoir or tank or worked on the surface monitoring the activities of the diver inside that tank. If silt had not been removed, the paper-making process would have been inhibited. (TR 68-84)

Two divers usually worked as a team for four hours each day, each working the four hours separately underwater (apparently the limit) and then each diver spent four hours monitoring the underwater work and safety of his partner. On January 20, 1987 Claimant started his work day at 7:30 A.M. and some time thereafter developed a headache. Claimant, suspecting perhaps carbon monoxide poisoning, asked his diving supervisor to check his air supply. The supply was approved and Claimant continued his work. However, the headache worsened and he started to climb up the ladder to egress the water but started to regurgitate and as he was wearing an air-tight helmet, he swallowed some vomit, tried to hold his breath and "vaguely" remembers reaching the surface. Claimant was brought to Mercy Hospital and a CT scan "showed a massive intraventricular hemorrhage." He finally regained consciousness as a hospital patient. He was hospitalized 122 days, 80 days of which were spent in intensive care. (TR 36-46)

Claimant was discharged on May 22, 1987 with these diagnoses (CX 4 at 1):

DISCHARGE MEDICATIONS: Aldomet, 500 mg.
Theragran Hematinic
Zantac, 150 mg., h.s.
Tylenol, p.r.n.

DISCHARGE DIAGNOSES:

1. Subarachnoid hemorrhage secondary to arteriovenous malformation.

2. Bilateral empyemas and bronchopleural fistulae.

3. Adult respiratory distress syndrome secondary to aspiration pneumonia.

4. Hypertension.

5. Yeast sepsis, probably Candida.

OPERATIVE PROCEDURES:

Multiple therapeutic lavages.
Ventriculostomy.
CVP lines twice.
Left lung decortication and closure or bronchopleural fistula. Right lung decortication and wedge resection and closure of bronchopleural fistula. Right lung decortication and closure of bronchopleural fistula also done on 3/21 as well as on 1/26.
Right tube thoracostomies on five occasions.
Left tube thoracostomies four times.

CONSULTATIONS: Dr. A. Palatchi
Dr. T. Brown
Dr. K. Wehr
Dr. H. Ramadas
Dr. W. Krall

Claimant who was treated and examined by numerous physicians felt "very, very weak" in May of 1987 and could

only walk about thirty (30) feet and lift about five pounds; he weighed 175 pounds on January 20, 1987 and 117 pounds at time of his discharge. He recuperated at the family home near Buffalo and was hospitalized twice for angiograms at Erie County Medical Center. In November of 1987 he moved to Tempe, Arizona to escape the Buffalo winter and he started to work as a part-time security guard; in March of 1988, earning $4.25 or $4.50 per hour; he became a full-time worker in May or June.

In January of 1989 he left Tempe and went to Albuquerque where he obtained work as a full-time laborer at a lumber mill, earning $4.25 per hour operating a radial arm saw. He spent four months there earning money to have his truck repaired, Claimant returning to Buffalo in September. He obtained work as a laborer at a masonry construction firm earning $6.00 per hour. He had duties of carrying concrete blocks--weighing 10 to 60 pounds--a distance of from 20 to 100 feet. He tired easily and had to take frequent rest breaks of short duration, taking an average of 5 to 8 such breaks each hour. In November of 1989 he began vocational technical school to learn to become a machinist. The class will end in March of 1990 and he is passing his courses although his short-term memory loss causes him problems in class and in doing his assigned tasks. He also works part-time at a local supermarket and earns $3.80 per hour cleaning equipment and the floors in the meat department. (TR 46-60) Claimant experiences shortness of breath upon the slightest exertion, dust and fumes are especially bothersome to his respiratory system and he catches colds more easily and more frequently. He has to take frequent rest breaks. (TR 61-63)

Claimant's October 18, 1989 pulmonary function tests were interpreted by the physician as showing "severe restrictive lung disease . . . (and) an insignificant 5% decrease of TLC (total lung capacity) since 1987." (CX 3 at 1) Claimant's medical records reflect that he was admitted on October 5, 1987 to the Erie County Medical Center for a cerebral angiogram and Dr. Donald Solonium states as follows in his October 6, 1987 Discharge Summary (CX 3 at 2):

DISCHARGE DIAGNOSIS: Possible cerebral arteriovenous malformation.

PRINCIPAL PROCEDURE: Cerebral angiogram.

HISTORY: Dale Rizzi is a 25-year old while male who was diving in January of 1987 when he had a subarachnoid hemorrhage from a left parietal AVM (arteriovenous malformation). This AVM was demonstrated angiographically and subsequently by CT on his original admission at hospital in Ohio. At the time he required ventriculostomy and multiple thoracotomies. He was seen in Neurosurgery Clinic in July 1987 in Buffalo for follow up. At the time his thoracic empyema which had been present since his original event was still draining through the thorocostomy tubes. He was followed in the Neurosurgery Clinic until this problem has resolved. He is admitted now for cerebral angiography.

HOSPITAL COURSE: The patient is admitted to the hospital and on the 5th of October 1987 underwent cerebral angiography. Initial reading of the cerebral angiogram was

negative; however, continued review of the angiograms will be required due to the small nature of the arteriovenous malformation. This review will be finished and a report will be given to the patient in 2 weeks when he reports to the Neurosurgery Clinic. Claimant also underwent a complete cerebral angiogram on October 29, 1987 to rule out a possible cerebral arteriovenous malformation. (CX 23 at 2)

Dr. Thomas J. Godar, Direction, Section of Pulmonary Diseases, Saint Francis Hospital and Medical Center, Hartford, Connecticut, reviewed Claimant's medical records and the doctor, in a most detailed report, dated June 9, 1989, commented and concluded as follows (CX 2 at 9 and 10):

"There is no doubt whatsoever from the description of the event that the patient's heavy lifting and straining induced the intracerebral hemorrhage and precipitated a sequence of events leading to a very complex course and very extensive respiratory impairment. It is my impression that the vomiting that occurred while he still had the helmet on and shortly after the helmet was removed, was in fact responsible for initiating the insult to the upper and lower respiratory tract that resulted in the development of the ARDS (acute respiratory distress syndrome). The lack of immediate ARDS is not at all unusual in this situation and it has been known to develop as late as 72 hrs. after a serious inhalation injury. Since the patient apparently had excellent exercise tolerance and no evidence for underlying lung disease, there is no other complicating factor that would have predisposed him to the devastating disease that resulted . . .

" It appears quit clear that the work activities at the time of the acute injury represent a substantial factor in causing the subsequent pulmonary injury resulting from aspiration pneumonia and a secondary ARDS with the complications of empyema and bronchopleural fistula leading to prolonged complex hospitalization and multiple surgical procedures."

Respondents' attorney, by letter of July 8, 1989, "request(ed) a further clarification" of Dr. Godar's June 9, 1989 report and the doctor responded (CX 2 at 3 and 4):

"The neurosurgical literature is replete with articles on intracerebral hemorrhage associated with aneurysms of A-V Malformation (angiomas) but the precise risk of bleeding from a pre-existing lesion is still not clear . . .

"In conclusion, I continue to believe that the event that caused Mr. Rizzi's admission to the hospital on 1/20/87 resulted from the rapid alterations and elevation of intracerebral blood pressure associated with straining that produced a bleed from a pre-existing congenital A-V malformation . . ."

Dr. Godar responded further to Claimant's attorney by letter dated December 23, 1989 and concluded as follows (CX 2 at 1):

"Based on the American Medical Association Guidelines for Respiratory Impairment, the patient has a Class III or moderate impairment, representing approximately a 45%

loss of respiratory function. This would translate into a 35% impairment of function for both lung and for the whole person. I should note that this is a relatively conservative interpretation since the pulmonary function test reveals some striking variations in impairment, MVV being only 43% of predicted while the diffusion capacity is 71% of predicted. This estimation is based on the balance of these test abnormalities in which some are greater than the estimated impairment and some less.

"In my opinion, these findings are not likely to improve further and therefore the patient should be considered to have received maximum medical improvement at this time. It is further my opinion, using reasonable medical judgment that the patient is permanently and totally disabled for return to his former job as an underwater diver."

Dr. Kenneth L. Wehr, one Claimant's attending physicians at Mercy Hospital in Hamilton, Ohio, stated as follows in his May 11, 1987 report (CX 6 at 3)

"Dale Rizzi is a 25 year old man who was admitted to Mercy Hospital on 1/22/87 having incurred a subarachnal hemorrhage with collapse. Approximate to that admission he was involved in diving to presumably clean tanks at a local industry.

"The subarachnal hemorrhage resolved (sic?) that he developed probably due to aspiration pneumonia, bilateral pneumonia with adult respiratory distress syndrome, bilateral pneumothoraces and bilateral empysemas which required extensive surgery. His condition now is

stabilizing. It is expected that he will take at least 3-6 more months for recovery.

"It is my impression that the approximate cause of the rupture of the malformation is related to his diving and perhaps the increased venous pressures associated with breath holding et cetera, all maneuvers associated with underwater diving. His aspiration pneumonia and adult respiratory distress syndrome were associated with aspiration following the altered consciousness state associated with subarachnoid hemorrhage." (CX 6 at 3)

The Mercy Hospital bill relating to the Claimant's hospitalization and treatment from January 20, 1987 through May 22, 1987 totals $262,622.43. (CX 5) The record reflects other bills sent directly to Claimant by the physicians: (CX 7 $5,740.00; CX 10 $15,365.00; CX 16 $215.00; CX 17 $47.00; CX 18 $100.00(?); CX 19-2 $2,969.10 (apparently a summary submitted by the collection agency of the individual bills which are a part of CX 19).

Victor T. Rizzi, Claimant's father, testified that his son was in excellent health before January 20, 1987, that at the time of his discharge from the hospital his son was a "walking skeleton" and that actually he should not have been released because he still had inserted chest tubes remaining from his thoracostomies. A nursing service was required twice weekly until the removal of the tubes. Claimant's short-term memory is poor and that memory deficit has caused problems at his current vocational retraining and in his daily living. His son also is bothered by shortness of breath

upon exertion. Claimant's father has not spoken to anyone at Champion International but he did talk to a female representative from the Carrier who told him that compensation benefits and the medical expenses would be paid. She gave him her business card, but he could not recall her name. (TR 88-98)

John T. Wheeler, Director of Business Services, Mercy Hospital, whose task it is to render proper bills to the proper parties, presented the hospital bill in question (CX 5) and he testified that the total balance is fair and accurate and represents the "largest bill" every submitted by his hospital. Mr. Wheeler has observed many pleasure boats on the Great Miami River in the summer. In 1913 a "horrendous flood" occurred and the Miami Current Conservancy District which was formed in 1920 has built five dams to control the waters of the Great Miami River. Mr. Wheeler estimated that the GMR was 250 to 300 feet wide in the area of the Champion plant, (2) that the GMR starts about 100 miles north of Hamilton, Ohio and (3) that about seventeen miles south of Hamilton the GMR flows into the Ohio River. Dayton, Ohio is the nearest large city. Mercy Hospital is "very close" to the Champion plant and Claimant was immediately admitted to the Hospital and his hospitalization was treated as due to a workers' compensation injury, and such status was indicated on the hospital bill. (CX 5, item 57; TR 98-107)

About one month after the injury Mr Wheeler spoke to a female representative of the Carrier who was granted permission to see Claimant's medical records and to take photographs of Claimant. Mr. Wheeler testified that it was

"very unusual" for one month to elapse before such contract by an insurance representative. He could not remember her name but he indicated that her name could be obtained from hospital records. (TR 107-113) He sent a bill to the Carrier in June of 1987. (CX 24) Mr. Wheeler, by letter dated January 23, 1990, identified Ms. Marjorie M. Pater as the Carrier's representative who visited him on April 10, 1987 and who led him to believe that Claimant's medical bills and compensation would be paid. (CX 26) Mr. Wheeler gave additional testimony by deposition on Mach 19, 1990 (CX 28) and he has offered twenty-three photographs he took from his office, which are photographs of the GMR, the Champion plant and other views of the GMR at Hamilton, Ohio.

The record contains a copy of Public Notice No. 83-LD-016, issued July 28, 1989, by the U.S. Army Corps of Engineers, Louisville District, and the notice relates to the Limits of Jurisdiction exercised by that district. That eleven page notice (1) requires, inter alia, that permits be obtained for most work within the navigable waters of the United States and (2) provides that the U.S. Army Corps of Engineers exercises jurisdiction over the Great Miami River for 117 miles about its mouth and that the river's location is given as 491.0 Ohio River Mile.

Patrick H. Carigan, a transportation consultant who, inter alia, "assist(s) people with applications for permit(s) to do work in navigable waters of the United States" and who was a Civil Engineer with the U.S. Army Corps of Engineers from 1951 to 1979 testified herein by deposition (RX 2). Mr. Carigan is "very much" familiar with the Ohio

River and its tributaries, one of which is the Great Miami River. Carigan Deposition Exhibit 1 is a "standard Ohio River navigation chart which is sold to the public for use in navigating on the river" and, although not showing Hamilton, Ohio thereon, was offered by Respondents to demonstrate the source of the Great Miami River. That exhibit shows the first seven miles of the river and Hamilton is an additional twenty-six miles up river on the Great Miami River (GMR), Miamitown Gage (six?). According to Mr. Carigan, the GMR had a water depth as of January 20, 1987 in normal flow periods of about two to two and one half feet at mile 14.5 upriver. According to Mr. Carigan, GMR is not navigable in the vicinity around Hamilton and there is neither ship repair nor longshoring operations nor cargo transportation on the GMR between Hamilton and the mouth of the GMR because the GMR is shallow, and contains as well other obstructions such as the B & O Railroad Bridge, which has a vertical clearance of 29.2 feet, at the source of the GMR. (RX 2 at 4-19)

Moreover, according to Mr. Carigan, the Corps of Engineers has jurisdiction over the deposition of refuse, waste-products or construction projects in and around navigable waterways or around tributaries of navigable waterways such as the GMR at Hamilton, Ohio. The Corps of Engineers would be responsible for issuing permits in the Hamilton area. The Ohio River is a navigable waterway and there is much commercial shipping by barges and two boats all along the Ohio river. The largest boat Mr. Carigan has ever seen on the GMR is a sixteen to eighteen foot bass fishing boat. Mr. Carigan estimated the GMR was about 400 feet wide at mile 33, as represented on Carigan

Deposition Exhibit 2, within Hamilton corporate limits. The Sewage Disposal Plan apparently is a city-owned facility. A permit would have to be obtained from the Corps of Engineers before a firm could draw water from the GMR to operate a business "because of the possible impact of the construction activity on the water quality" and pursuant to the Clean Waters Act which entrusted such jurisdiction to the Corps of Engineers. A permit would also be needed to perform any dredging on the GMR. Mr. Carigan identified Public Notice 83-LD-016, dated 28 July 1989 (CX 15), as the type of document he had previously seen and, in response to intense cross-examination by Claimant's counsel, he admitted that 33 U.S.C. §407 prohibits placing or causing to be placed into navigable waters any materials "in such a manner that it might be washed into the waterway and become either a pollutant or a hindrance to the flow of water."

Mr. Carigan also admitted that the U.S. Army Corps of Engineers regulates activities in and around navigable waters and activities in and around the GMR and Hamilton, Ohio but not because the GMR is a navigable waterway but because of the Clear Waters Act. A navigable waterway, according to Mr. Carigan, is one which is "capable of sustaining a commercial operation of navigation for profit." Mr. Carigan also admitted (1) that a permit would be needed from the Army Corps of Engineers for the removal of silt and residue from tank water before it is discharged into the GMR and (2) that the Champion Paper plant, adjacent to the GMR, was the type of activity or structure under the permit process of the Army Corps of Engineers. (RX 2 at 22-41)

Mr. Carigan estimated that the average depth of the GMR in the vicinity of Hamilton, Ohio is "between four and five feet," Mr. Carigan opining that such depth would not permit commercial river traffic in that area. (Id. at 41-44) Mr. Carigan also admitted that the pumped-out silt and debris after it is discharged into the GMR and after it is washed downstream for thirty-three miles might end up in the Ohio River and "could be injurious to (such) navigation." (Id. at 46-47)

Matthew P. Zerbe, a law clerk/paralegal at the law firm in Cincinnati providing local legal services for Respondents, testified that on March 9, 1990 he accompanied a private investigator in an airplane and took photographs of the Champion International plant on the GMR and twenty-five photographs, which he identified and which are numbered sequentially, were offered on behalf of the Respondents and they are attached to Mr. Zerbe's deposition testimony in evidence of RX 3. The photographs were taken a altitudes varying from 2000 to 2,500 feet. (RX 3)

On the basis of the totality of this closed record and having observed the demeanor of and having heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

In arriving at a decision in this matter, the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inference from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain

Trimmers Association, Inc. 390 U.S. 459 (1968), reh. denied, 391 U.S. 939 (1968); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Seaman v. Jacksonville Shipyard, Inc., 14 BRBS 148.9 (1981); Brandt v. Avondale Shipyards, Inc., 8 BRBS 698 (1978); Sargent v. Matson Terminal, Inc., 8 BRBS 564 (1978). At the outset it further must be recognized that all factual doubts must be resolved in favor of the Claimant. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Strachan Shipping Co. v. Shea, 406 F.2d 521 (5th Cir. 1969), cert. denied, 395 U.S. 921 (1970). Furthermore, it consistently has been held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. Durrah v. WMATA, 760 F.2d 320 (D.C. Cir. 1985); Champion v. S & M Traylor Brothers, 690 F.2d 285 (D.C. Cir. 1982). Harrison v. Potomac Electric Power Company, 8 BRBS 313 (1978).

The Act provides a presumption that a claim comes within the provisions of the Act. See 33 U.S.C. §920 (a). This Section 20 presumption "applied as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F. 2d 71 (5th Cir.1980).

The threshold issue in this case is whether or not Claimant is covered maritime employee under the Act. At the outset it is well to keep in mind that the Benefits Review Board has consistently held that the Section 20(a) presumption that a claim comes within the provisions of the Act is inapplicable to the threshold issue of jurisdiction. Sedmak v. Perini North River Associates, 9 BRBS 378 (1978); aff'd sub nom. Fusco v. Perini North River Associates, 601 F.2d 659 (2d Cir. 1979), rev'd on other grounds, 444 U.S. 1028 (1980); 622 F.2d 659 (2d Cir. 1980) (decision on remand). Wynn v. Newport News Shipbuilding and Dry Dock Company, 16 BRBS 31 (1983); Boughman v. Boise Cascade Corporation, 14 BRBS 173 (1981); Holmes v. Seafood Specialists Boat Works, et al, 14 BRBS 141 (1981). However, the United States Court of Appeals for the Fifth Circuit has held that "(t)he judicial policy has long been to resolve all doubts in favor of the employee and his family and to construe the Act in favor of the employee for whose benefits it is primarily intended", Army Air Force Exchange v. Greenwood, 585 F.2d 791 (5th Cir. 1978), and that the policy of the Act has been to "resolve doubtful questions of coverage in the Claimant's favor." Tampa Ship Repair v. Director, 535 F.2d 936, 938 (5th Cir. 1976).

While the Longshore Act does not define "Navigable Waters," the United States Code Annotated (herein "USCA"), in Chapter 26 of its section on Navigation and Navigable Waters and the Clean Water Act, defines "Navigable Waters" as "the waters of the United States, including the territorial seas." 33 USCA §1362 (7). The Supreme Court has defined it in The Daniel Ball, 77 U.S. 557, 563 (1871) as ". . . navigable waters of the United

States within the meaning of the Acts of Congress . . . when they form a continued highway over which commerce is or may be carried on with other States or foreign countries . . ." (Emphasis added) In resolving the threshold issue as to whether or not the Great Miami River ("GMR") is "Navigable Waters" of the United States, it is well to keep in mind certain well-settled principles of law gleaned from Admirality and Maritime Law, due to the paucity of cases under the Longshore Act dealing with this particular issue, keeping in mind the humanitarian and beneficent purposes of the Longshore Act.

In determining whether a waterway is navigable, the factual inquiry is whether the water has the capability of use by the public for the purpose of transportation and commerce, U.S. v. Kaiser Aetna, 584 F.2d 378 (9th Cir. 1978). This includes the personal use of a waterway by private boats. U.S. v. Appalachian Power Co., 311 377, 61. Ct. 291 (1940)

The United States Supreme Court has held many times that

> In determining whether waters within state are navigable so that title to lands underlying them passed from United States to state on state's admission to Union, question of navigability is federal question determinable according to law and usages recognized in federal courts, regardless of whether waters are capable of use for navigation in interstate or foreign commerce. U.S. v. State of Oregon, 295

U.S. 1, 55 S. Ct. 610 (1935); 295 U.S. 701, 55 S. Ct. 879 (1935) (decree pursuant to decision).

Moreover, whether or not a body of water is navigable is to be determined by federal law. Puyallup Tribe of Indiana v. Port of Tacoma, 525 F. Supp. 65 (D.C. Wash. 1981), aff'd 717 F.2d 1251, cert. denied, 465 U.S. 1049, 104 S. Ct. 1324 (1981) reh. denied, 466 U.S. 954, 104 S. Ct. 2162 (1984). The constitutional authority of the United States to regulate commerce and navigation includes the power to control erection of structures in navigable waters. State of Washington Department of Game v. Federal Power Commission, 207 F.2d. 391(9th Cir. 1953), cert. denied, 347 U.S. 936, 74 S.Ct. 626 (1954). While this Court may take judicial notice of the navigable character of large and well-known bodies of water within its jurisdiction, see, e.g., State of Arizona v. State of California, 283 U.S. 423, 51 S.Ct. 522 (1931), the navigability of those waters of a more insignificant character must be established by evidence, and the burden of proof rests upon the party who asserts the navigability of a particular waterway. See e.g., Goose Creek Hunting Club, Inc. v. U.S., 518 F.2d 579, 207 Ct. Cl. 323 (1975); Iowa-Wisconsin Bridge Co. v. U.S., 84 F. Supp. 852, 114 Ct. Cl. 464 (1949), cert. denied, 339 U.S. 982, 70 S.Ct. 1020 (1950); Mintzer v. North American Dredging Co., 242 F. 553 (D.C. Calif. 1916), aff'd 245 F. 297, 157 C.C.A. 489 (1917); Harrison v. Fite, 148 F. 781, 78 C.C.A. 447 (Ark. 1906). In determining questions of navigability, official reports and public notices of the War Department (now Secretary of the Army), expressing opinions as to navigability, may be admitted into evidence

for consideration with all other evidence. U.S. v. Appalachian Electric Power co., 23 F. Supp. 83 (D.C. Va. 1938), aff'd, 107 F.2d 769 (4th Cir. 1939), rev'd on other grounds, 311 U.S. 377, 61 S.Ct. 291 (1940), reh. denied 312 U.S. 712, 61 S.Ct. 548 (1941), petition denied, 317 U.S. 594, 63 S.Ct. 67 (1942).

The capability of use by the public for purposes of transportation and commerce is the true criterion of the navigability of a waterway, rather than the extent and manner of its current or past use. Alabama Power Co. v. Gulf Power Co., 283 F. 606 (D.C.) Ala. 1922) (Emphasis added). Moreover, a waterway is a "navigable waterway" if it is suitable for use as a highway for commerce, and a waterway meets this requirement if it presently is being used or is suitable for use, or if it has been used or was suitable for such use in the past, or if it could be made suitable for use in the future by reasonable improvements. Pitship Duck Club v. Town of Sequim, (D.C. Wash. 1970) (Emphasis added); Coates v. U.S., 110 F. Supp. 471, 124 Ct. Cl. 806 (1953); Iowa-Wisconsin Bridge Co., v. U.S., supra. To be "navigable" a water course in its natural state should be useful for commerce or transportation. U.S. v. Ladley, 4 F. Supp. 580, (D.C. Idaho 1933). Streams capable of being used for the purpose of carrying boats, passengers, freight, floating logs, timber, wood or any other product to market are navigable. The Montello, 87 U.S. 430 (1874); (Emphasis added); The Montello, 78 U.S. 411 (1871); The Daniel Ball, 77 U.S. 557 (1871); Chisolm v. Caines, 67 F. 285 (C.C.S.C. 1894); Spokane Mill Co., v. Post, 50 F. 429 (C.C. Idaho 1892). A Navigable river is one which in its natural state is capable of floating logs,

boats and rafts. Ne-Bo-Shore Ass'n, Inc. v. Hogarth 7 F. Supp 885 (D.C. Mich. 1934), aff'd 81 F.2d (70) (1936) (Emphasis added).

It is also well to keep in mind that the fact that portions of a river are no longer used for commerce does not dilute the power of Congress over them. State of Oklahoma ex rel. Philips v. Guy F. Atkinson Co., 313 U.S. 508, 61 S. Ct. 1050 (Okla. 1941). Moreover, disuse attributable to improved highways and changed methods of distribution for commerce does not affect the navigability of a river. Rochester Gas and Electric Corp. v. Federal Power Commission, 344 F.2d 594 (C.A. N.Y. 1965), cert. denied, 382 U.S. 832, 86 S.Ct. 72 (1965). A stream once established as navigable does not lose this characteristic by subsequent disuse. Allen Gun Club v. U.S., 180 Ct. Cl. 423 (1967). In order to be a navigable stream it is not necessary that the waters be deep enough to admit the passage of boats at all portions of the stream. St. Anthony Falls Water-Power Co. v. Board of Water Commissioners of City of St. Paul, Minn., 168 U.S. 349, 18 S.Ct 157 (Minn. 1897). While mere depth does not, ipso facto, make a stream navigable, want of depth or capacity in part of its course does not make it unnavigable. Mintzer, supra.

Furthermore, in determining whether a particular river is navigable the Court may consider evidence that the U.S. Congress has made expenditures for improvement of the river, although such evidence is not necessarily conclusive on the issue. U.S. v. Appalachian Electric Power Co., supra. Moreover, a river is a "navigable waterway" of the United States when, by improvements with reasonable

regard to cost and need, it may be available for navigation in interstate commerce, even though such improvements have neither been made nor authorized. Pennsylvania Water & Power Co. v. Federal Power Commission, 123 F.2d 155, 74 App. D.C. 351 (D.C. Cir. 1941), cert. denied 315 U.S. 806, 62 S. Ct. 640 (1942) (Emphasis added).

Navigability does not depend on the amount of tonnage, depth of water, width of the stream, nor the use at some time for commerce; navigability is determined by natural conditions. Economy Light & Power Company v. U.S., 256 F. 792 (C.C.A. Ill. 1919), aff'd. 356 U.S. 113, 41 S.Ct. 409 (1921) (Emphasis added). Rivers may be "navigable" despite obstruction by falls, rapids, sand bars or shifting currents. Wisconsin Public Service Corp. v. Federal Power Commission, 147 F.2d 743 (7th Cir. 1945), cert. denied, 325 U.S. 880, 65 S. Ct.1574 (1945); U.S. Appalachian Electric Power Co., supra.

The Courts have consistently recognized that the concept of "navigable waters" should be given the broadest possible constitutional interpretation. U.S. v. Byrd, 609 F.2d 1204 (7th Cir. 1979); Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978); U.S. v. Saint Bernard Parish, 589 F. Supp. 617 (D.C. La. 1984); U.S. v. Robinson, 570 F. Supp.1157 (D.C. Fla. 1983), and that the terms "navigable waters" and "waters of the United States" are not void for vagueness. U.S. v. Oxford Royal Mushroom Products, Inc., 487 F. Supp. 852 (D.C. Pa. 1980). Finally, a river which is navigable in fact is navigable in law. The Montello, 87 U.S. (20 Wall.) 430 (1874); The Montello, 78 U.S. (11 Wall.) 411 (1870); The Daniel Ball, 77 U.S. (10 Wall.) 557

(1871); Hubbard v. Fort, 188 F. 987 (C.C.N.J. 1911); State of Maryland v. Miller, 180 F. 796 (D.C.) Md. 1910, mod. on other grounds, 194 F. 775, 114 C.C.A. 495, cert. denied, 225 U.S. 703 (1912); Harrison v. Fite, supra.

It has also been a long-standing principle of law that the navigability of a stream for the purpose of bringing it within the concept of "navigable waters of the United States" does not depend upon the mode by which commerce is conducted upon it, as whether by steamers or sailing vessels, or Durham boats; nor upon the difficulties attending navigation, such as those made by falls, rapids, and sandbars, even though these be so great they while they last they prevent the use of the best means, such as steamboats, for carrying on commerce; it depends upon the fact whether the river in its natural state affords a channel for useful commerce. The Montello, 20 Wall. 430, 22 L. Ed. 391 (1874) (Emphasis Added). The expression "navigable waters" effectively excludes from consideration any concept of navigability in law or in fact. U.S. v. GAF Corp., 389 F. Supp 1379 (D.C. Tex. 1975).

It has long been recognized that the right of the United States in navigable waters within the several states is limited to control thereof for purpose of navigation. U.S. v. 50 Foot Right of Way or Servitude In, Over and Across Certain land in City of Bayonne, Hudson County, New Jersey, 377 F.2d 956 (CANJ 1964).

Congress has entrusted jurisdiction over the navigable waters of the United States to the Department of War and the Secretary of War (titles changed to Department of the

Army and Secretary of the Army, respectively, by Section 205(a) of Act July 26, 1947, C.343, Title II, 61 Stat. 501) and 33 U.S.C.A. §1 states:

§1. Regulations by Secretary of Army for navigation of waters generally

It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department . . . (Aug 18, 1894, C. 299 §4, 28 Stat. 362; June 13, 1902, C. 1079, §§ 6, 11, 32 Stat. 374; August 8, 1917, C. 49, § 7, 40 Stat. 266.)

With these well-settled principles in mind, I shall now proceed to determine whether or not the Great Miami River (GMR) is "navigable waters" of the United States under the Longshore Act.

First of all, the United States Army Corp of Engineers exercises jurisdiction over the entire 117 miles of the GMR and on July 20, 1989 issued public Notice 83-LD-016. (CX 15) page three of that notice contains notification of such exercise of jurisdiction for 117 miles of the GMR above its mouth and that is notice to all concerned that necessary permits and authorizations must be obtained in appropriate situations so that navigation on the GMR will not be affected adversely.

The record contains forty-eight photographs of the GMR and the Champion International Paper Plant at Hamilton, Ohio. (Deposition exhibits to RX 3 and CX 28.) The GMR is 117 miles in length and has as its source the Ohio River, clearly a navigable waterway. See Dye v. U.S., 210 F.2d 123 (Ky. 1954); BB & W Ferry v. Interstate, 40 F.2d 323 (C.C. W.Va. 1930). The GMR at Hamilton is at mile 33 (Deposition Exhibit 2 to RX 2) above its source at the Ohio River and at that point the GMR is at least 300 feet wide, according to Mr. Thomas Wheeler, Claimant's witness, or 400 feet wide, according to Mr. Carigan, Respondent's witness, and at least 2 1/2 feet deep, according to Mr. Carigan, or perhaps as deep as twenty feet, according to Claimant's testimony. (TR 75)

Claimant testified that he saw small pleasure boats on the GMR but, as he was at Hamilton in the dead of winter, this injury taking place on January 20, 1987, he did not see that many boats. No commercial traffic or tow-line barges were observed in the Hamilton area by anyone who has testified herein. The record contains no evidence as to what activities take place at any other section of the GMR as it meanders along its 177 mile course. Claimant could not walk along the side of the Champion plant which was parallel to the GMR "because it was right on the river." (TR 74) Claimant could not see the river bed of the GMR; he did see docks for pleasure crafts. He saw "no large piers there." (TR 68-86)

I find most persuasive the fact that the U.S. Army Corps of Engineers exercises jurisdiction over the entire 117 miles of the GMR, that funds have been appropriated by Congress

and entrusted to the Corps of Engineers relative thereto and that, unlike some other waterways, the GMR has not been declared by Congress to be non-navigable as the GMR is not included in the list of other rivers so identified therein. See, e.g., Subchapter II, 33 U. S. C.A. §§ 21-59t.

Accordingly, I find an conclude that the GMR is a "navigable waterway" of the United States and that such status is not defeated by the lack of commercial activities on the GMR at the time of Claimant's injury. The legal principles relevant to the concept of "navigable waters" have been extensively summarized above, in view of the novel issue before this Administrative Law Judge, and I will simply reiterate that the GMR is a navigable waterway as (1) it is "susceptible of use in its ordinary condition as a highway of trade and travel in customary modes on water," U.S. Brewer-Elliott Oil & Gas Co., 249 F. 609 (D.C. Okla. 1918), aff'd 270 F. 100 (1920), (2) it is "useful for commerce or transportation," U.S. V. Ladley, 4 F. Supp. 580 (D.C. Idaho 1933), (3) it is capable of floating logs, boats and rafts (Ne-Bo-Shone Ass'n, Inc., supra, and Iowa-Wisconsin Bridge Co. v. U.S., 84 F. Supp. 852, 114 Ct., Cl. 464 (1949), cert. denied, 339 U.S. 982, 70 S.Ct. 1020 (1950), (4) is used as waterway transportation by private boats, U.S. v. Appalachian Power Co., 311 U.S. 377 (1940), and (5) any subsequent disuse of the GMR, due to changed geographical conditions and, most important, improved highways, especially the Interstate Highway System, does not change the navigable character of the waterway without specific declaration by Congress, as Congress has done with so many other waterways.

The question of situs in this case is a complex and a novel issue. While Claimant was injured in the reservoir or tank of Champion International Company he was clearly not only upon the navigable waterway but he was also within it, as shall now be discussed.

The record extensively summarized above reflects that although Claimant was not directly in the Great Miami River, he was within a channel of water which flowed from the Great Miami River through this Champion International reservoir underneath its factory and then back into the GMR. Waters running through diversion tunnels have been held to be still navigable waterways for purposes of the Longshore and Harbor Workers' Act. See Morrison-Knudson Company v. O'Leary, 288 f.2d 542 (9th Cir. 1961) (an artificial tunnel used solely to divert the Snake River during construction of a dam was held to be navigable waters). Waterways which involved diversion from river channels into factories and back to the main river have also been considered navigable waters under the Act. See C.J. Montag and Sons, Inc. v. O'Leary, 304 F.Supp. 1881 (D.C. Or. 1969) (A "tailrace" or "stream" formed by water returning to the Willamette River after it had been diverted for use in the manufacturing plant was held to be a navigable river).

In view of the foregoing, I further find and conclude, for purposes of this litigation, that the GMR has been diverted by Champion into its approximately 100' X 100' X 15' reservoir or tank, that such tank is immediately adjacent to the navigable waterway, that the tank water is used by Champion as part of its manufacturing process, that such

water, after its use by Champion, is then piped back into the reservoir or tank and then pumped back into the GMR, and that such uninterrupted flow of the GMR into and out of the reservoir or tank constitutes, again for purposes of this litigation, a continuation of the navigable waters of the United States.

Thus I further find and conclude (1) that Claimant's injury has taken place in and upon the navigable waters of the United States, (2) that Claimant's underwater work subjected him to the hazards and dangers of maritime employment, (3) that, prior to his injury, Claimant made it a practice to avoid the onrushing flow of water at both the intake and outtake pipes because of the tidal wave effect of such waters and (4) that such water hazards and dangers form the very foundation for the passage in 1927 of the Longshore Act, i.e., a recognition by Congress that traditional maritime employment in and around navigable waters is a very dangerous occupation.

Moreover, it is well-settled that an employee performing traditional maritime work and who is injured in performing such duties in and upon navigable waters and who was covered by the Longshore Act prior to 1972 is also covered by the Act after the 1972 Amendments as Congress extended the status test only to land-based injuries after the effective date of such Amendments. Director, OWCP v. Perini North River Associates, 454 U.S. 1080, 103 S.Ct. 634, 651 (N. 34) (1983). Most of Claimant's work as an underwater diver for the Employer constitutes maritime employment and it can scarcely be argued that Claimant, at the moment of injury, was fortuitously and transiently upon

the navigable waters of the United States. Moreover, it is well-settled that Claimant's overall duties for the Employer have to be considered, rather than isolating upon his specific duties at the moment of injury. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348 (1977).

Claimant's activities on January 20, 1987 concerned removing silt and mud from the reservoir or tank, which silt and mud could have an adverse and deleterious effect upon the GMR, as well as upon the Ohio River, some 33 miles down river south of Hamilton. Thus, Claimant's work at the reservoir or tank of Champion can be likened to those of harbor workers dredging and improving navigable waters. See, e.g., Thompson v. Potashnik Construction, 21 BRBS 59 (1988), Decision and Order on Recon., 21 BRBS 63 (1988). Claimant's testimony on that point is not conclusive on this legal issue. (TR 8)

I am also persuaded by the following case in which an airplane pilot who was engaged in spotting schools of fish and directing fishing vessels to same and who was killed when his plane crashed into the Gulf of Mexico. The employer in that case contended that the decedent was not covered by the Longshore Act since his "status" was not that of a longshoreman, harborworker or other employee listed in Section 2(3) of the Act. However, the Court stated that the list of occupations in Section 2(3) was not exclusive, and that any employee injured on navigable waters meets the jurisdictional requirements of the Act. Ward v. Director, OWCP, 684 F.2d 1114 (5th Cir. 1982), cert. denied, sub nom. Zapata-Haynie Corp. v. Ward, 459

U.S. 1170, 103 S.Ct. 815 (1983).

It is apparent that Congress, in passing the original Longshore Act in 1927, including the subsequent Amendments, intended to create liability where the Employer had a real or constructive notice of the likelihood of coverage, but notice to the Employer was sufficient here because of the nature and situs of the underwater work. Once the maritime employment status of the employee has been determined, there is no question that the employer is a statutory employer under the Act. Blundo v. International Terminal Operating Co., 432 U.S. 249 (1977), aff'g, 544 R.2d 35 (2 Cir. 1976); Hullinghorst Industries v. Carroll, 650 F.2d 750 (5th Cir. 1981), cert. denied 454 U.S. 1163, 102 S. Ct. 1037 (1982); Novelties Distribution Corp. v. Molee, 710 F.2d 992 (3rd Cir. 1983) cert. denied, 465 U.S. 1012, 104 S.Ct. 1014 (1983).

Congress, in the 1984 Amendments, has specifically excluded from coverage under the Act certain classifications of workers. However, for the exclusions to apply, the claimant must be eligible for state workers' compensation benefits. The exclusions point out Congressional intent to exclude workers who do not face the dangers or hazards of maritime employment. While Congress excluded those engaged in certain recreational activities, I note that the implementing Regulations exclude only "recreational scuba diving." I find the omission of "commercial" scuba diving as most significant as the regulations do specifically exclude "commercial rafting." In view of its importance herein, the regulation will be quoted.

20 CFR §701.301(a)(12)(iii)(B) provides as follows:

(B) Individuals employed by a club (meaning a social or fraternal organization whether profit or nonprofit), camp, recreational operation (meaning any recreational activity including but not limited to scuba diving, commercial rafting, canoeing or boating activities operated for pleasure of owners, members of a club or organization or renting, leasing or chartering equipment to another for the latter's pleasure), restaurant, museum or retail outlet.

Thus, I conclude the Claimant's work as an underwater diver is not excluded by the 1984 Amendments. Moreover, the Benefits Review Board has had the opportunity to review the activities of an underwater diver in Sharp v. Pacific Gas & Electricn, 2 BRBS 381 (1975). In Sharp, the decedent was an engineer participating in a special scuba diving training program sponsored by his employer. The purpose of the training was to qualify decedent as a diver competent to inspect the employer's underwater facilities and structures. The Board held that decedent was a covered maritime employee, the Board stating:

> "Although 'maritime employment' includes. . . any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . .,' it is not limited to persons engaged in those activities. 33 U.S.C. §902(3). In this case, in the furtherance of his employer's business purpose, the decedent was being

> trained to make underwater inspections of various structures and facilities, an activity for which the employer had previously hired only professional scuba divers."

I also note that the State of Ohio considers the GMR as one of its three principal rivers, the Scioto River and the Ohio River being the others. (CX 22)

Assuming, arguendo, that reviewing authorities might subsequently hold that Champion's reservoir or tank is not a navigable waterway, an alternative basis for concluding that Claimant is a maritime employee is the fact that this claim comes within the so-called twilight zone between coverage under the act for injuries or deaths upon t he navigable waters of the United States or an adjoining area and the state's concurrent jurisdiction over land-based injuries.

Congress, in passing the 1984 Amendments to the Act and in excluding certain categories of employees, e.g., Sections 2(3) and 3(a) of the Act, has premised such exclusion upon such workers being covered under state workers' compensation acts. The United States Supreme Court has recognized concurrent jurisdiction, in appropriate situations, relating to claims prosecuted under the Act and under a state's workers' compensation act. Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 100 S. Ct. 2432 (1980). Claimant was injured in the course and scope of his employment with this Employer and he has been advised that the claim cannot be brought under the Ohio statute because he was only in Ohio temporarily. (CX 33)

Congress, in passing the 1984 Amendments to the Act and in excluding certain categories of employees, e.g., Sections 2(3) and 3(a) of the Act, has premised such exclusion upon such workers being covered under state workers' compensation acts. The United States Supreme Court has recognized concurrent jurisdiction, in appropriate situations, relating to claims prosecuted under the Act and under a state's workers' compensation act. Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432 (1980). Claimant was injured in the course and scope of his employment with this employer and he had been advised that the claim cannot be brought under the Ohio statute because he was only in Ohio temporarily. (CX 33)

As Respondents' attorney points out, there is a very serious legal issue as to which state forum, if any, applies as there is an important issue as to the Claimant's state of residence. (RX 7) Moreover, Claimant has also been advised that he may not successfully proceed under the Connecticut statute, the Employer's state of incorporation, as the injury took place in Ohio, and as there seems to be a question as to Claimant's state of residence. White there apparently has been no final decision in Connecticut on the state claim and while Respondents have now withdrawn their appeal in that forum (RX 7), Claimant's advice on this likelihood is persuasive, again only as an alternative holding, because this humanitarian and beneficent Act should not be interpreted in such manner as to result in a harsh and incongruous result. Claimant as severely injured on January 20, 1987, was in intensive care for 80 days, was hospitalized for 122 days and is making a very slow recovery therefrom. Thus, there must be a remedy available

for Claimant. The Act, in my judgment, is the appropriate remedy.

Respondents cite Herb's Welding, Inc. v. Gray, 470 U.S. 414, 105 S.Ct. 1421, 17 BRBS 78 (CRT) (1985), as support for their position that Claimant is not a maritime employee.. However, Herb's Welding is, in my judgment, distinguishable as that case deals with the work of a welder who "spent roughly three quarters of his working time on platforms in state (territorial) waters" and who was voluntarily paid benefits by his employer pursuant to the Louisiana workers' compensation statute. Herb's Welding, supra, 17 BRBS at 79 (CRT). The Supreme Court noted, at Page 81, that early in the legislative history of the 1972 Amendments to the Longshore Act "a bill was introduced to extend the Act to all offshore oil workers. The bill died in committee." Thus, the Supreme Court concluded that the welding of an oil pipeline did not constitute maritime employment, the Court noting that "drilling platforms were not even suggestive of traditional maritime affairs." (Id.)

I find most persuasive footnote 10, on page 83 (CRT), wherein the Supreme Court noted:

> 10. This view of "maritime employment" does not preclude benefits for those whose injury would have been covered before 1972 because it occurred "on navigable waters." Director, OWCP v. Perini North River Associates, 459 U.S. 297, 103 S. Ct. 634, 74 L.Ed.2d 465 (1983). No claim is made that Gray was injured "on

navigable waters." Indeed, it was agreed by all counsel at oral argument that prior to 1972 Gray would not have been covered, except arguably by operation of the Lands Act. See Tr. of Oral Arg. 11, 46, 52-54. See also 703 F.2d, at 179.

In light of the dissent's reliance on Perini, post, at 1437, we point out that that decision was carefully limited to coverage of an employee "injured while performing his job on actual navigable waters." 459 U.S., at 299, 103 S.Ct., at 641, 655-645, 646, 651. The Court's rationale was that, first, any employee injured on navigable waters would have been covered prior to 1972, and, second, Congress did not intend to restrict coverage in adopting its "maritime employment" test. The holding was, "of course, limited to workers covered prior to 1972, id., at 324, n.34, 103 S.Ct., at 651, n. 34, a group to which Gray does not belong. The opinion says nothing about the contours of the status requirement as applied to a workers, like Gray, who was not injured on navigable waters. To hold that enactment of the status requirement did not constrict prior coverage is wholly different from refusing to view that requirement as a meaningful limit on the Act's extended coverage.

The U.S. Supreme Court has held that a maritime employee

is one who spends at least some of his/her time in longshoring operations. Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348 (1977); Brady-Hamilton v. Herron, 568 F.2d 137 (9th Cir. 1978). The Fifth Circuit Court of Appeals held that only 2 1/2 to 5 percent of a claimant's work spent in maritime work was sufficient to meet the "status" requirement in Boudloche v. Howard Trucking Co., 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981), rev'g, 11 BRBS 687. In Howard v. Rebel Well Service, 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981), rev'g, 11 BRBS 568 (1979), the Court found ten percent was sufficient to bring that claimant within the definition of maritime employment.

The "overall employment" test mandates the examination of the claimant's entire job to determine if some part of it is maritime. Brown v. Reynolds Shipyard, 9 BRBS 614 (1979).

Thus, as an alternative holding, I conclude that the majority of Claimant's work for the Employer was performed under navigable waters and that he is a maritime employee.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director,

Office of Workers Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc. 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. Gardner v. Bath Iron Works Corporation, 11 BRBS 556 (1979), aff'd sub nom. Garner v. Director, OWCP, 640 F.2d 1385 (1st Cir. 1981).

Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Strachan Shipping v. Nash, 782 F.2d 513 (5th Cir. 1986); Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. Bludworth Shipyard, Inc. v. Lira, 700 F. 2d 1046 (5th Cir. 1983); Mijangos, supra; Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981).

In the case at bar, Dr. Godar and Dr. Wehr have opined that Claimant's work activities on January 20, 1987 and his underwater diving accident have caused his intracerebral hemorrhage, requiring immediate hospitalization for 122 days, which injury resulted in a subsequent pulmonary

injury resulting from aspiration pneumonia and a secondary ARDS with complications of empyema and bronchopleural fistula leading to prolonged complex hospitalization and multiple surgical procedures. Claimant's pre-existing, congenital and apparently asymptomatic A-V Malformation was triggered by his work activities and the intracerebral hemorrhage on January 20, 1987. The resulting injury and disability therefrom constitute a compensable work-related injury, and I so find and conclude. Strachan Shipping, supra.

This closed record conclusively establishes that Claimant was severely injured on January 20, 1987 in the course and scope of his maritime employment for the Employer joined herein, that the employer had immediate notice of the injury, that Claimant was immediately hospitalized for 122 days and that he timely filed a claim for benefits as neither the Employer nor Liberty Mutual Insurance Company, the Employer's Carrier under the Act, accepted the claim under either the Act or a state workers' compensation statute.

The remaining issue is the nature and extent of the Claimant's disability.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Owens v. Traynor, 274 F. Supp. 770 (D.Md. 1967), aff'd 396 F.2d 783 (4th Cir. 1968), cert. denied, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical

condition alone. Nardella v. Campbell Machine, Inc., 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. American Mutual Insurance Company of Boston v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. Id. At 1266.

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. Carroll v. Hanover Bridge Marina, 17 BRBS 176 (1985); Hunigman v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment which claimant is capable of performing and which he could secure if he diligently tried. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Air America v. Director, 597 F.2d 773 (1st Cir. 1979); American Stevedores, Inc. V. Salzano, 538 F.2d 933 (2d Cir. 1976); Elliot v. C & P Telephone Co., 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, Shell v. Teledyne Movible Offshore, Inc., 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, Trans-State Dredging v. Benefits Review Board, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. Royce v. Elrich Construction Company, 17 BRBS 156

(1985).

Claimant has established he cannot return to work as an underwater diver. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. American Stevedores, Inc. V. Salzano, 538 F.2d 933 (2d Cir. 1976). Southern v. Farmers Export Company, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of alternative employment. See Pilkington v. Sun Shipbuilding and Dry Dock Company, 9 BRBS 473 (1978), aff'd on reconsideration after remand, 14 BRBS 119 (1981). See also Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980). However, I find Claimant has a partial disability as Claimant is presently working part-time.

Nature and Extent of disability

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. General Dynamics Corporation v. Benefits Review Board, 565 F.2d 208 (2d Cir. 1977); Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), cert. Denied, 394 U.S. 976 (1969); Trask v. Lockheed Shipbuilding and Construction Company, 17 BRBS 56 (1985) The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of

"maximum medical improvement." McCray v. Ceco Steel Co., 5 BRBS 537 (1977). The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. Meecke v. I.S.O. Personnel Support Department, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. Exxon Corporation v. White, 617 F.2d 292 (5th Cir. 1980), aff'g 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. Fleetwood v. Newport News Shipbuilding and Dry Dock Company, 16 BRBS 282 (1984), aff'd 776 F.2d 1225, 18 BRBS 12 (CRT) 94th Cir. 1985).

On the basics of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on June 9, 1989 and that he has been permanently and partially disabled from June 10, 1989, according to the well-reasoned opinion of Dr. Thomas J. Godar.

Claimant's recovery was slow and gradual and he is now

being retained for an alternative career as a machinist. However, even that re-training has been delayed by Claimant's significant memory loss. The Benefits Review Board has held that maximum medical improvement can be attained even though vocational rehabilitation has not been completed. Trask v. Lockheed Shipbuilding and Construction, 17 BRBS 56, 60, 61 (1985).

Claimant apparently has worked on and off between March of 1988 and June 9, 1989. However, this record does not reflect the wages earned. Respondents are entitled to a credit for those earnings to prevent a double recovery. Those wages should be submitted to and the amount of the credit computed by the Deputy Commissioner as I believe this to be the most expeditious procedure in a matter which has been pending so long.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury is the date on which the Employee or Claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Todd Shipyards Corp. V. Black, 717 F.2d 1280 (9th Cir. 1983); Dolowich v. West Side Iron Works, 17 BRBS 197 (1985); Hoey v. General Dynamics Corporation, 17 BRBS 229 (1985); Pitts v. Bethlehem Steel Corp., 17 BRBS 17

(1985); Yalowchuck v. General Dynamics Corporation, 17 BRBS 13 (1985).

The Act provides three methods for computing average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986). "Substantially the whole of the year" refers to the nature of Claimant's employment. Eleazar v. General Dynamics Corporation, 7 BRBS 75 (1977). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. Hole v. Miami Shipyards Corp., 12 BRBS 38 (1980), rev'd on other grounds, 640 F.2d 769 (5th Cir. 1981); see Waters v. Farmers Export Company, 14 BRBS 102 (1981) aff'd per curiam, 710 F.2d 836 (5th Cir. 1983). Claimant worked for the Employer only from October , 1987 to January , 1988. Therefore Section 10(a) is inapplicable. The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree, 698 F.2d 743 (5th Cir. 1983), rev'g on other grounds, 13 BRBS 862 (1981), rehearing granted en banc, 706 F.2d 502 (5th Cir. 1983), petition for review dismissed, 723 F.2d 399 (5th Cir. 1984), cert.denied, 469 U.S. 818, 105 S. Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and

fairly be applied," Section 10(c) is applied. See National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288 (9th Cir. 1979). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). See generally Turney v. Bethlehem Steel Corporation, 17 BRBS 232, 237 (1985); Cioffi v. Bethlehem Steel Corp., 15 BRBS 201 (1982); Holmes v. Tampa Ship Repair and Dry Dock Co., 8 BRBS 455 (1978); McDonough v. General Dynamics Corp., 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonable represent . . . earning capacity of the injured employee." The federal courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. Hastings v. Earth Satellite Corp., 628 F.2d 85 (D.C. Cir. 1980), cert.denied, 449 U.S. 905 (1980); Miranda v. Excavation Construction, Inc., 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where Claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. Klubnikin v. Crescent Wharf and Warehouse Company, 16 BRBS 182 (1984). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. Roundtree, supra, 13 BRBS 862 (1981); compare Brown v. General Dynamics Corporation, 7 BRBS 561 (1978).

Claimant alleges that he earned $3,888.44 for the 49 days he worked for Underwater Construction Company (Employer) and that these wages produce an average weekly wage of $396.80, pursuant to Section 10(a), because

the additional amounts he received for being out of the state of Connecticut should be included in his average weekly wage. The Respondents have submitted no wage data contradicting claimant's position on his average weekly wage. (CX 31 at 33) As wage records were not produced herein, I shall invoke the Board's holding in Brown v. General Dynamics Corporation, supra, and conclude that it would be most unjust to utilize a division of 52. See Bonner v. National Steel & Shipbuilding, 5 BRBS 290 (1977), aff'd in pertinent part, 600 F.2d1288 (9th Cir. 1979).

Claimant worked for the Employer from October 18, 1986 to January 20, 1987, a total of 49 days, during eleven pay periods, according to the Carrier's report. (CX13) Thus, I find and conclude that claimant's average weekly wage is $353.50 ($3,888.44 - 11), pursuant to Sections 10(c) and (d). Contrary to Claimant's position, Section 10(a) cannot be used as Claimant did not work substantially the whole of the year prior to January 20, 1987 for this Employer or in the same or similar work.

Section 8(h)

Section 8(h) provides that the wage-earning capacity of an injured employee shall be his actual post-injury wages if they fairly and reasonably represent his wage-earning capacity. Moreover, Section 8(h) mandates a two part analysis of the employee's wage-earning capacity. The first inquiry is whether actual post-hearing wages reasonably represent wage-earning capacity. Only if there are no actual wages, or if actual wages are found not to reasonably

represent wage-earning capacity, does the second inquiry take place into what dollar amount reasonably represents wage-earning capacity. It is well-settled that the party who contends that the claimant's post-injury earnings (or lack of earnings) are not truly representative of his post-injury wage-earning capacity has the burden of establishing a different figure for post-injury wage-earning capacity. Spinner v. Safeway Stores, Inc., 18 BRBS 155 (1986); Sheek v. General Dynamics Corporation, 18 BRBS 1 (1985); Misho v. Dillingham Marine & Manufacturing, 17 BRBS 188, 190 (1985); Spencer v. Baker Agricultural Company, 16 BRBS 205, 208 (1984); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980); Bolduc v. General Dynamics Corporation, 9 BRBS 851 (1979); Palmore v. Washington Metropolitan Area Transit Authority, 9 BRBS 388.22 (1978).

In Devillier v. National Steel and Shipbuilding Co., 10 BRBS 649 (1979) the Benefits Review Board set forth in extensive detail the factors this Administrative Law Judge should consider in determining whether claimant's post-injury earnings are representative of his post-injury wage-earning capacity, and, if they are not, how to determine claimant's post-injury wage-earning capacity. See also Drake v. General Dynamics Corporation, 11 BRBS 288 (1979). It is also well-settled that higher post-injury wages, which may be due in part to increased general wage levels, are not necessarily determinative of the amount of claimant's wage-earning capacity. Long v. Director, OWCP, 767 F.2d 1578 (9th Cir. 1985); Todd Shipyards Corp. V. Allan, 666 F.2d 399, 402 (9th Cir. 1982), cert. denied, 459 U.S. 1034 103 S.Ct 444 (1982). Travelers

Insurance Company v. Mc Lellan, 288 F.2d 250 (2d Cir. 1961); Harris v. Atlantic and Gulf Stevedores, Inc., 9 BRBS 7 (1978) (J. Smith, dissenting). In Devillier, supra, the Board emphasized that lost wage-earning capacity should be determined based upon a comparison of Claimant's average weekly wage at the time of the injury and his wage-earning capacity immediately after the injury. See also Drake v. General Dynamics Corporation, supra. Moreover, the Board has consistently interpreted Section 8(h) to require that Claimant's post-injury wage-earning capacity be based on the wage rate of his post-injury job at the time of his injury. Turner v. Bethlehem Corp., 17 BRBS 232, 238 (1985); Bethard, supra, 12 BRBS 695 (1980).

The concept of a loss of wage-earning capacity encompasses such factors as the beneficence of a sympathetic employer, the claimant's earning capacity on the open market, whether the claimant is required to expend more time, effort or expertise to achieve pre-injury production, and whether the claimant can perform his pre-injury physical work activities. Phelps v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 325 (1984); Hughes v. Litton Systems, Inc., 6 BRBS 301 (1977); See Travelers Insurance Co. V. McLellan, 288 F.2d 250 (2d Cir. 1961).

The doctors are in agreement that claimant will never return to work as an underwater diver and the record reflects that claimant is earning about seventy-seven dollars per week, $3.80 per hour, doing part-time work for a local supermarket, work where he basically cleans the floor and meat-cutting equipment. He is able to that work as "there

is no extreme physical exertion" and he does not "need to take a break." (TR 58-59) Thus, I find and conclude that claimant is able to preform his part-time work of 22 hours per week and, thus is partially disabled. This claim, in my judgment, does not warrant that claimant be declared totally disabled, even though working, as such status is clearly limited to situations involving a sympathetic and benevolent employer who allows the employee to rest as often as needed. Thus, an award of total disability benefits is not appropriate. Proffitt v. E.J. Bartells, Co., 10 BRBS 435 (1979). See also Patterson v. Savannah Shipyard & Machine, 15 BRBS 28 (1982).

Claimant's post-injury wages must be adjusted for inflation and, as the parties have not furnished the wages for his post-injury job as of January 20, 1987, I shall adopt the minimum wage as of that date, or $3.35. Thus, I find that Claimant's post-injury wage-earning capacity to be $73.70 ($3.35 x 22=) and that he is entitled to an award of permanent partial benefits, as of June 10, 1989, based upon two-thirds of the difference between $353.50, his average weekly wage, and $73.70, his post-injury wage-earning capacity.

Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. Avallone v. Todd shipyards Corp., 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due

benefits to insure that the employee receives the full amount of compensation due. Watkins v.. Newport Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th ir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that "... the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. Section 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 270 (1984), modified on reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the Deputy Commissioner. The appropriate rate shall be determined as of the filing of this Decision and Order with the Deputy Commissioner.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. Barbour v. Woodward & Lothrop, Inc., 16 BRBS 300 (1984).

Entitlement to medical services is never time-barred where a disability is related to a compensable injury. Mayfield v. Atlantic & Gulf Stevedores, 16 BRBS 228 (1984); Dear v. Marine Terminals Corp., 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. Bulone v. Universal terminal and Stevedore Corp., 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. Gilliam v. The Western Union Telegraph Co., 8 BRBS 278 (1978).

In Shahady v. Atlas Tire & Marble, 13 BRBS 1007 (1981), aff'd, 682 F.2d 968 (D.C. Cir. 1982), cert denied, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc., 15 BRBS 299 (1983); Beynum v. Washington Metropolitan Area Transit Authority, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. Atlantic & Gulf Stevedores, Inc. V. Neuman, 440 F.2d 908 (5th Cir. 1971); Matthews v. Jeffboat, Inc., 18 BRBS at 189 (1986). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. Roger's Terminal and

Shipping Corporation v. Director, OWCP, 784 F.2d 687 (5th Cir. 1986).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), Claimant may not recover medical costs incurred. Betz v. Arthur Snowden Company. 14 BRBS 805 (1981). See also 20 C.F.R. Section 702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. Roger's Terminal, supra.

In the case sub judice, Claimant in a comatose state was brought to Mercy Hospital, Hamilton, Ohio, within one-half mile of the accident scene, was immediately hospitalized for 122 days and the Employer and its Carrier have steadfastly refused to authorize appropriate medical care and treatment. Mr. Wheeler, Mercy Hospital's General Manager, has testified that Claimant required extensive treatment for his numerous medical problems, that the treatment rendered Claimant was reasonable and proper, according to local medical standards, and that the Mercy Hospital bill for the entire hospitalization totaled $262,622.43. (TR 98-111; CX5)

In view of the foregoing, I find and conclude (1) that the medical care and treatment rendered Claimant for this work-related injury was reasonable, necessary and appropriate (See, e.g., Loxley v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 215 (1990), and (2) that any failure by Claimant or his doctors to send the

attending physicians' reports to the Employer or its Carrier is hereby excused for good cause and in the interests of justice as a futile action in view of Respondent's failure to accept the claim and authorize appropriate medical care and treatment.

Section 14(e)

Claimant is entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), for the following reasons:

Failure to begin compensation payments or to file a notice of controversion with twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten percent (10%) of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. Universal terminal and Stevedoring Corp. V. Parker, 587 F.2d 608 (3rd Cir. 1978); Rucker v. Lawrence Mangum & Sons, Inc., 18 BRBS 76 (1986); White v. Rock Creek Ginger Ale Co., 17 BRBS 75, 78 (1985); Frisco v. Perini Corp., 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a Notice of Controversion is filed or on the date of the informal conference, whichever is earlier. National Steel & Shipbuilding Co. V. U.S. Department of Labor, 606 F.2d 875 (9th Cir. 1979); National Steel & Shipbuilding Co. V. Bonner, 600 F.2d 1288 (9th Cir. 1978); Spencer v. Baker

Agricultural Company, 16 BRBS 205 (1984); Reynolds v. Marine Stevedoring Corporation, 11 BRBS 801 (1980).

The Benefits Review Board has held that an employer's liability under Section 14(e) is not excused because the employer believed that the claim came under a state compensation act. Jones v. Newport News Shipbuilding and Dry Dock Co., 5 BRBS 323 (1977), aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. V. Graham, 573 F.2d 167 (4th Cir. 1978), cert. denied, 439 U.S. 979 (1978).

The Benefits Review Board has held that "a notice of suspension of termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." White v. Rock Creak Ginger Ale Company, 17 BRBS 75, 79 (1985); Rose v. George A. Fuller Company, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring).

The Employer immediately learned of Claimant's injury on January 20, 1987 but paid no compensation and did not file a notice of controversion until on or about January 20, 1988. Thus, the Respondents are liable for a Section 14(e) assessment for the installments due between January 20, 1987 and January 20, 1988, or the actual filing of the Notice of Controversion.

Attorney's fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the

Employer/Carrier (Respondents). Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondent's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after the informal conference on June 15, 1989. Services performed prior to that date should be submitted to the Deputy Commissioner for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner.

It is therefore ORDERED that:

1. The Employer and Liberty Mutual Insurance Company (herein Respondents) shall pay to the claimant compensation for temporary total disability from January 20, 1987 through June 9, 1989, based upon an average weekly wage of $353.50, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on June 10, 1989, the Respondents

shall pay to claimant compensation for permanent partial disability, based upon the difference between his average weekly wage at the time of the injury, $353.50, and his wage-earning capacity after the injury, $73.50, as provided by Sections 8(c)(21) and 8(h) of the Act.

3. The Respondents are entitled to a credit for Claimant's part-time earnings between March of 1988 and June 9, 1989, and such credit shall be computed by the Deputy Commissioner.

4. Interest shall be paid on all accrued benefits at the T-bill rate applicable under 28 U.S.C. Section 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the Deputy Commissioner.

5. The Respondents shall pay to claimant an additional ten (10) percent payment, pursuant to Section 14(e) of the Act, based upon installments due between January 20, 1987 and January 20, 1988, or the actual filing date of the Form LS-207.

6. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act, including payment of the Mercy Hospital bill in evidence as CX 5.

7. Claimant's attorney shall file, within thirty (30)

days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondent's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over the legal services rendered and costs incurred after June 15, 1989, the date of the informal conference.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated: Jun 23 1990

Boston, Massachusetts

DWD/las

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
800 K STREET N.W.
WASHINGTON, D.C. 20001-8001

In the Matter of:

DALE R. RIZZI, Claimant-Petitioner
against
UNDERWATER CONSTRUCTION CORP., Employer
and
Liberty Mutual Insurance Company, Carrier

BRB No. 90-2346A
BRB No. 93-0918

David A. Kelly, Esq. For the Claimant

Scott Wilson Williams, Esq.
James D. Moran, Jr., Esq for the Employer/Carrier

Before Dolder, Acting Chief Administrative Appeals Judge,
Smith and McGranery, Administrative Appeals Judge

DECISION AND ORDER

PER CURIAM:

Employer appeals the Decision and Order and Decision on Motion for Reconsideration (89-LHC-3118) of

Administrative Law Judge David W. Dinardi awarding benefits and claimant appeals the Compensation Order-Award of Attorney's Fees (Case No. 10-27319) of District Director Richard V. Robilotti rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act as amended, 33 U.S.C. Section 901 *et seq.* (the Act).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U..S. 359 (1965); 33 U.S.C. Section 921(b)(3). The amount of an attorney's fee award is discretionary, and the award may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on January 20, 1987 while employed as a diver for Underwater Construction Corporation (employer). Employer has its headquarters in Connecticut, and claimant was dispatched to diving jobs in various states. As a diver on this particular job, claimant was responsible for pumping the silt and mud from the underground tank of the Champion International Paper Company which is located adjacent to the Great Miami River in Hamilton, Ohio. The water from the river was pumped

---

1 Employer's appeal of the attorney's fee award (BRB No. 90-2346) was dismissed by Board Order dated April 28, 1993 pursuant to employer's request for withdrawal dated March 23, 1993.

into the reservoir tank through an intake pipe for use in the paper-making process and, after being used, was discharged through other pipes and returned to the river. In the performance of his work, claimant used a pump which weighed over 100 pounds to remove the silt from the reservoir's intake pipes and pump it back into the river. The tank was approximately 100 feet by 100 feet by 15 feet. Claimant estimated that the depth of the water in the reservoir was about four to twelve feet and characterized the tank as essentially a basement with water. H. Tr. at 68.

On the morning of the accident, claimant started work at 7:30 a.m. and some time thereafter developed a headache. The headache worsened and he started to climb up the ladder to egress the water but started to regurgitate and, as he was wearing an air-tight helmet, he swallowed some vomit, unsuccessfully tried to hold his breath and "vaguely remembers reaching the surface." Claimant was taken to Mercy Hospital and a CT scan showed a massive intraventricular hemorrhage. He eventually regained consciousness and was hospitalized for 122 days, 80 of which were spent in intensive care.

Following a period of recovery, claimant worked on and off in non-diving employment between March 1988 and June 9, 1989 and at the time of the hearing was being re-trained for an alternative career as a machinist. However, the retraining had been delayed by claimant's significant memory loss. Claimant sought temporary total and permanent partial disability benefits under the Act.

Initially, the administrative law judge found that

claimant's work for employer was covered under the Act as it was performed under navigable waters and as claimant's work is maritime employment. The administrative law judge also found that claimant was injured on January 20, 1987 in the course and scope of his maritime employment for employer and that claimant established that he cannot return to work as an underwater diver. However, the administrative law judge found that as claimant was working part-time, he is partially disabled and that his disability became permanent as of June 10, 1989.

The administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. Section 910(c), and found that claimant had an average weekly wage of $353.50 at the time of injury. The administrative law judge also found that claimant's post-injury wages at a part-time job at a supermarket fairly represents his wage earning capacity, and thus, after an adjustment for inflation, found that claimant's post-injury wage-earning capacity is $73.70 per week. The administrative law judge awarded claimant temporary total disability benefits from January 20, 1987 to June 6, 1989, and permanent partial disability benefits, as of June 10, 1989, based upon two-thirds of the difference between $353.50, his average weekly wage, and $73.70, his post-injury wage-earning capacity. 33 U.S.C. Section 908(b),(c)(21). The administrative law judge also awarded claimant interest, medical expenses, a penalty pursuant to Section 14(e), 33 U.S.C. Section 914(e), and ordered employer to pay claimant's attorney's fee. In a Decision on Motion for Reconsideration, the administrative law judge reviewed employer's contentions regarding the findings of average

weekly wage, post-injury wage-earning capacity, and coverage under the Act and concluded that the original Decision and Order would not be modified, except for a typographical error. Decision on Motion for Reconsideration at 4.

Subsequently, the district director awarded claimant's counsel an attorney's fee in the amount of $10,500 to be paid by employer. In a letter dated October 29, 1990, the district director noted that the fee was reduced from the requested amount of $19,987.63 because it contained work unrelated to the Longshore Act claim.

On appeal, employer contends that the administrative law judge erred in finding that claimant's employment was covered by the Act as the tank where claimant was working should not be considered navigable waters, nor was the tank used for loading, unloading, repairing, dismantling or building vessels. In addition, employer contends that the administrative law judge erred in finding that claimant satisfied the status test as claimant's duties were not related to maritime activities. Employer also contends that the administrative law judge erred in calculating claimant's average weekly wage and in determining claimant's post-injury wage-earning capacity. BRB No. 93-918. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

On appeal of the district director's award of an attorney's fee, claimant contends that the director reduced the fee without sufficient explanation and did not specifically apply the regulations governing the award of an attorney's

fee. BRB No. 90-2346A. Employer responds, urging affirmance as the district director unequivocally stated that he considered the value of the attorney's services to claimant, the complexity of the case, the amount of time involved, the results achieved and other facts including the professional expertise of the attorney.

Initially, we agree with employer's contention that the administrative law judge erred in finding that claimant was injured on navigable waters. Before the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, claimant had to establish that his injury occurred "upon the navigable waters of the United States (including any dry dock)...." *See* U.S.C. Section 903(a)(1970)(amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of Section 2(3), 33 U.S.C. Section 902(3), and to expand the sites covered under Section 3(a) landward. In *Director, OWCP v. Perini North River Associates,* 459 U.S. 97, 103 S.Ct. 634, 15 BRBS 62 (CRT)(1983), the Supreme Court held that in making these changes to expand coverage, Congress did not intend to withdraw coverage of the Act from workers injured on navigable waters who would have been covered by the Act before 1972. *Perini,* 459 U.S. at 315-316, 103 S.Ct. at 646, 15 BRBS at 76-77 (CRT). Accordingly, the Court held that when a worker is injured on actual navigable waters in the course of his employment on those waters, he is a maritime employee under Section 2(3). Regardless of the nature of the work performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Perini,* 459 U.S. at 323-324, 103

S.Ct. at 650-651 BRBS at 80-81 (CRT); *Center v. R & D Watson, Inc.*, 25 BRBS 137 (1991): 33 U.S.C. Section 902(3)(A)-(H)(1988).

In his Decision and Order, the administrative law judge found that claimant was injured in a channel of water which flowed from the Great Miami River (GMR) through the Champion International reservoir underneath its factory and then back into the GMR. The administrative law judge found that the GMR is a "navigable waterway" of the United States as it is "susceptible of use in its ordinary condition as a highway of trade and travel in customary modes on water," and it is "useful for commerce or transportation." Decision and Order at 21. The administrative law judge also noted that the GMR is capable of floating logs, boats and rafts, is used as waterway transportation by private boats, and any subsequent disuse of the GMR, due to changed geographical conditions and improved roadways does not change the navigable character of the waterway without a specific declaration by Congress. *Id.* Moreover, citing *Morrison-Knudson Co. V. O'Leary*, 288 F.2d 542 (9th Cir. 1961), and *C.J. Montag and Sons, Inc. V. O'Leary*, 304 F.Supp. 188 (D.Or. 1969), the administrative law judge found that the water in the reservoir was an "uninterrupted flow" of the GMR that was merely diverted and thus constituted a continuation of the navigable waters of the United States.[2] Decision and Order at 22.

---

2 The administrative law judge also found that inasmuch as claimant had to avoid the onrushing flow of water at the intake and outflow pipes in the tank, claimant's work subjected him to hazards for which the Act was enacted. Decision and Order at 22.

We first hold that the administrative law judge erred in focusing on the navigability of the GMR, as the record establishes that claimant's injury occurred in the reservoir of the paper factory, and not in the actual river on in a channel thereof. We also reject the administrative law judge's reliance on the aforementioned cases, as both involved the navigability of artificial waterways that could be navigated by boats or barges.[3] The facts of the instant case are similar to those addressed by the Board in *LePore v. Petro Concrete Structures, Inc.*, BRBS 403 (1990). In *LePore*, the claimant was injured on a pontoon in a flume removing a temporary support structure from below the concrete base laid for the construction of the Winter Garden building of the World Financial Center at Battery Park, New York. The flume is 60 by 30 feet channel with sides, a concrete slab on top, landfill on the bottom, earth at one end and a seawall at the other end. The water in the flume was 20 to 25 feet deep, and seeped in through the gravel and rock base. The Board held that a threshold requirement of navigability is the presence of an "interstate nexus" in order for the body of water in

---

3 In *Morrison-Knudson Co. V. O'Leary*, 288 F.2d 542 (9th Cir. 1961), four workers were killed in a diversion tunnel of the Snake River. The court held that the water in the tunnel, constructed to carry the main stream of the river during dam construction, remained navigable within the meaning of the Act. In *C.J. Montag and Sons, Inc. V. O'Leary*, 304 F.Supp. 188 (D.Or.1969), a worker was killed in the tailrace of the Willimantic River, which was a stream formed by water returning to the river after diversion to two manufacturing plants. The court held that the tailrace was navigable as barges up to 130 feet long and 28 feet wide operated in the tailrace. *See also Ransom v. Coast Marine Construction, Inc.*, 16 BRBS 69 (1984)(Board holds that it takes a permanent withdrawal of water from bed of river to divest jurisdiction under the Act).

question to function as a continuous highway for commerce between ports. *LePore*, 23 BRBS at 405 *citing the Montello*, 78 U.S. (11 Wall.) 411 (1871). Thus, a natural or artificial waterway which is not susceptible of being used as an interstate artery of commerce because of either manmade or natural conditions is not navigable waters for purposes of coverage under the Act. *See Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978) *cert. denied*, 439 U.S. 893 (1978); *LePore*, 23 BRBS at 406; *Williams v Pan Marine construction*, 18 BRBS 98 (1986), *aff'd sub nom. Williams v. Director*, OWCP, 825 F.2d 246, 20 BRBS 25 (CRT) (9th Cir. 1987) (diver injured in land-locked lake entirely within state of California is not injured on navigable waters of the United States).

The Board noted in *LePore* that water from the Hudson River was permitted to seep into and out of the flume for the sole purpose of facilitating heating and cooling, not navigation, and that the flume could not support commerce. Similarly, in the instant case, the tank in which claimant was injured was a depository for heating and cooling system water and was tantamount to being land-locked because no vessel could gain access to it due to the walls surrounding it. *See Lepore*, 23 BRBS at 406; *Williams*, 18 BRBS at 100. Entry to the tank could only be gained by a door in the first floor of the factory, and claimant testified that it had the characteristics of a basement. H. Tr. At 68. Therefore, as the reservoir is surrounded by walls, was not designed to support commerce by water and could not be navigated through by any craft on the Great Miami River, we reverse the administrative law judge's finding that the reservoir constitutes "navigable waters" for the purposes of

determining coverage under the Act.[4] *See Lepore*, 23 BRBS at 406-407.

While injury on actual navigable waters is sufficient to establish coverage under both Sections 2(3) and 3(a), claimant may also establish coverage if his injury occurs in a landward area covered by Section 3(a) and his work is maritime in nature, bringing him within the definition of maritime employee in Section 2(3). *See* 33 U.S.C. Sections 902(3), 903(a)(1988); *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992). Section 3(a) provides that the injury must occur on the navigable waters of the United States "including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C.

---

4 In *Lepore*, the Board also affirmed the finding that the situs requirement was not satisfied because the water in the flume was permanently withdrawn from the Hudson River. *See also Ransom v. Coast Marine Construction, Inc.*, 16 BRBS 69 (1984). In this case, there appears to be a continous flow between the river and the plant reservoir through the intake and outflow pipes; nonetheless, the reservoir itself is not navigable, and the distinction between the two cases is immaterial.

Section 903(a)(1988).

In the present case, as the administrative law judge found that claimant was injured on navigable waters, he did not make any further findings under Section 3(a). However, in addition to not constituting "navigable waters," the site at the paper factor where claimant was injured is not one of the enumerated sites in Section 3(a), and there is no contention that it is an adjoining area used for the maritime activity of loading, unloading, building, dismantling or repairing vessels. Therefore, we hold that claimant's injury did not occur on a situs covered under Section 3(a) of the Act. *See Melerine*, 26 BRBS at 102. Accordingly, as the situs requirement is not satisfied in this case, we reverse the administrative law judge's finding that claimant's injury on January 20, 1987 is covered under the Act as the resultant award of benefits.[5] *See generally Cabaliero v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993). We need not address employer's contentions with regard to the status requirement of Section 2(3), or the administrative law judge's findings regarding claimant's average weekly wage and post-injury wage-earning capacity.

In his appeal, BRB No. 90-2346A, claimant contends that the district director arbitrarily the size of the attorney's fee awarded without sufficient explanation. However, inasmuch as we reverse the award of benefits, we also reverse the award of an attorney's fee to be paid by employer

---

5 In its brief to the Board, employer states that claimant received an award of benefits under Connecticut's workers' compensation law, which employer ultimately did not challenge. Emp. Brief at 22.

as there has been no successful prosection of the claim. *See* 33 U.S.C. Section 928(a), (b); *see generally Bluhm v. Cooper Stevedoring Co.,* 13 BRBS 427 (1981).

Accordingly, the Decision and Order of the administrative law judge awarding benefits and the Compensation Order-Award of Attorney's Fees of the district are reversed.

SO ORDERED.

NANCY S. DODLER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

CERTIFICATE OF SERVICE

BRB No. 90-2346-A:	Dale R. Rizzi v. Underwater Construction Company and Liberty Mutual Insurance Company (Case No. 89-LHCA-3118) (OWCP No. 02-0027319)
BRB No. 93-0918:	Dale R. Rizzi v. Underwater Construction Company and Liberty Mutual insurance Company (Case No. 89-LHCA-3118) (OWCP No. 10-0027319)

I certify that this Decsion and Order was sent this day to:

_____

Paul E. Travers, Executive Counsel
Clerk of the Board

David A. Kelly, Esq.
Montstream & May
Attorneys at Law
P.O. Box 1087
Salmon Brook Corporate Park
Glastonbury, CT 06033

Mr. Dale R. Rizzi
12 Brook Road
Lancaster, NY 81702

Scott Wilson Williams, Esq.
P.O. Box 269
Bridgeport, CT 06601

Ms. Carol A. DeDeo, Esq.
Associate Solicitor
U. S. Department of Labor
Suite S-4325
200 Constitution Avenue, N.W.
Washington, DC 20210

Mr. Richard V. Robilotti
District Director
OWCP-Longshore Division
201 Varick Street
New York, NY 10014

Mr. Thomas C. Hunter, District Director
OWCP-Longshore Division
Room 804
230 South Dearborn Street
Chicago, IL 60604

Judge David DiNardi
US Department of Labor
Room 507
John W. McCormack Post Office and Courthouse
Boston, MA 02109

U.S. Department of Labor
Benefits Review Board
800 K Street
Washington, DC 20001-8001

DALE R. RIZZI, Claimant-Petitioner
v.
UNDERWATER CONSTRUCTION CORP.
and
Liberty Mutual Insurance Company,
Employer/Carrier-Respondents

DECISION AND ORDER - on RECONSIDERATION

Appeals of the Decision and Order and Decision on Motion Reconsideration of David W. DiNardi, Administrative Law Judge, United States Department of Labor, and the Compensation Order - Award of Attorney's fees of Richard V. Robilotti, District Director, United States Department of Labor.

David A. Kelly (Montstream & May), Glastonbury, Connecticut, for claimant.
Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and MCGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant has filed a timely Motion for Reconsideration of the Board's Decision and Order in the above captioned case, *Rizzi v. Underwater Construction Corp.*, 27 BRBS 273 (1994). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407.

Claimant sustained a brain hemorrhage on January 20, 1987 while employed as a diver for Underwater Construction Corporation (employer). As a diver, claimant was responsible for pumping the silt and mud from the underground reservoir tank of the Champion Paper Factory which is located adjacent to the Great Miami River in Hamilton, Ohio. In the performance of his work, claimant used a pump to remove the silt from the reservoir tank's intake pipes and pump it back into the river. Claimant's retraining has been delayed by his significant memory loss, and claimant seeks permanent partial disability benefits under the Act.

Employer appealed the administrative law judge's award of benefits, contending that the administrative law judge erred in finding that claimant's employment was covered under the Act as the tank where claimant was working should not be considered navigable waters, nor was the tank used for loading, unloading, repairing, dismantling or building vessels. 33 U.S.C. §903(a). The Board reversed the administrative law judge's finding that the reservoir tank constitutes "navigable water" for the purposes of determining coverage under the Act and further held that the site of the injury was not an "adjoining area" under the Act. Therefore, the Board held that claimant's injury did not occur on a situs covered under Section 3(a) of the Act and reversed the award of benefits.[1]

---

1 Employer also contended that the administrative law judge erred in finding that claimant satisfied the status test as claimant's duties were not related to maritime activities and that the administrative law judge erred in calculating claimant's average weekly wage and in determining claimant's post-injury wage-earning capacity. The Board declined to address these contentions in light of the holding that claimant was not injured on a

In his motion for reconsideration, claimant contends that the Board erred in reversing the administrative law judge's finding that the site of the injury was a covered location under the Act. Employer has not responded to the motion for reconsideration.

Initially, we reaffirm the Board's holding that the administrative law judge erred in focusing on the navigability of the Great Miami River as the record establishes that claimant's injury occurred in the reservoir tank of the paper factory. It is not relevant that the issue of the navigability of the river was the subject of large amounts of evidence at the hearing, inasmuch as claimant was indisputably injured within the confines of the reservoir tank. Moreover, it is not relevant in the instant case that claimant's duties dredging silt from the tank back into the river might affect the navigability of the river or be subject to regulations of the Army Corps of Engineers. For purposes of a claim brought under the Act, an injury must occur at a covered location pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a), which focuses on the actual site of the injury. The effect of claimant's duties at the time of the injury on the surrounding location has no relevance to whether the reservoir tank is navigable waters. *See generally George v. Lucas Marine Construction,* BRBS , BRB No. 93-1612 (Sept. 28, 1994).

We also reject claimant's contention on reconsideration that the Board erred in holding that the cooling tank was not a

---

covered situs. Moreover, the Board reversed the award of an attorney's fee to be paid by employer as there had been no successful prosecution of the claim.

covered situs under the Act. The act itself does not define the phrase "navigable waters," but the basic test of navigability which has been applied for purposes of determining jurisdiction under the Act is that rivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *George*, slip op. At 5; *see also The Daniel Ball*, 77 U.S. (19 Wall.) 557, 563 (1871); *The Montello*, 78 U.S. (11 Wall) 411 (1871). Thus, a natural or artificial waterway which is not susceptible of being used as an interstate artery of commerce because of either manmade or natural conditions is not navigable waters for purposes of jurisdiction. *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978). The conditions inside the tank in the instant case, i.e. whether the water was moving swiftly or merely seeping in, do not affect its accessibility to interstate commerce. *Rizzi*, 27 BRBS at 278 N.4; *Lepore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990). Thus, it is irrelevant to a determination of navigability that water rushed in and out of the tank and that claimant thus was subject to "maritime hazards." *See Williams v. Pan Marine Construction*, 18 BRBS 98 (1986), *aff'd sub nom. Williams v. Director*, OWCP, 825 F.2d 246, 20 BRBS 25 (CRT) (9th Cir. 1987). As noted in the Board's decision, entry to the tank could only be gained by a door in the first floor of the factory, and claimant testified that it had the characteristics of a basement.[2] *Rizzi*, 27 BRBS at 278; Tr. At 68; *see also*

---

2 We do not address claimant's contention that a commercial diver is a "vessel" under the Act as it was not raised before the administrative law judge and cannot be raised for the first time before the Board. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). However, we note that in the

Lepore, 23 BRBS at 403. Therefore, we reaffirm the Board's holding that the reservoir was not designed to support commerce by water and could not be navigated through by any craft on the Great Miami River, and thus reverse the administrative law judge's finding that the reservoir constitutes "navigable waters" for the purposes of determining coverage under the Act.

Claimant also contends that the Board erred in stating that there was no contention that this injury occurred in an "adjoining area," pursuant to Section 3(a). Section 3(a) provides that the injury must occur on the navigable waters of the United States "including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, repairing, dismantling, or building a vessel." 33 U.S.C. §903(a) (1988); *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992). Although the factory in this case is indisputably located on the edge of a river, there is no evidence, and the parties do not contend, that the reservoir tank, or the factory, was used to load, unload, repair, dismantle or build a vessel. Thus, the site of the injury is not an "adjoining area" pursuant to Section 3(a). 33 U.S.C. §903(a). The situs test is

---

case cited in support of this contention by claimant, *Wallace v. Oceaneering International*, 727 F.2d (5th Cir. 1987), the United States Court of Appeals for the Fifth Circuit held that the Jones Act, 46 U.S.C. §688, was applicable to an oilfield diver who spent 96 percent of his working time at sea, who ate and slept aboard a vessel in navigation and who was exposed to maritime perils with regularity and continuity. *Wallace*, 727 F.2d at 436. The court does not hold that the diver himself was a vessel for purposes of determining jurisdiction under either the Jones Act or the Longshore Act.

not merely because the injury occurred adjacent to water. *Melerine*, 26 BRBS at 101.

Finally, we reject claimant's contention that the administrative law judge properly found that the claim comes within the so-called "twilight zone" between coverage under the Act for injuries or deaths on the "navigable water" of the United States and under a state's concurrent jurisdiction of land-based injuries. Although the United States Supreme Court has recognized concurrent jurisdiction, in appropriate situations, relating to claims prosecuted under the Act and under a state's workers' compensation act, *see Sun Ship, Inc. V. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980), in this case the coverage provisions of the Act have not been met and no independent doctrine exists to provide concurrent jurisdiction.[3]

Accordingly, we grant the Motion for Reconsideration, but deny the relief requested. 20 C.F.R. §802.409. The Board's decision is reaffirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

---

3 We need not address claimant's contentions regarding his status under the Act inasmuch as a claimant must meet both the status requirement of Section 2(3) and the situs requirement of Section 3(a), 33 U.S.C. §§902(3), 903(a), and we reaffirm the holding that the situs requirement has not been met. *See Cabaliero v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

CERTIFICATE OF SERVICE

BRB No. 90-2346-A:

Dale R. Rizzi v. Underwater Construction Company and Liberty Mutual Insurance Company

BRB No. 93-0918:

Dale R. Rizzi v. Underwater Construction Company and Liberty Mutual Insurance Company (Case No. 89-LHCA-3118) (OWCP No. 10-0027319)

I certify that this Decision and Order was sent this day to:

_____ _____

(Date) Paul E. Trayers
Clerk of the Board

David A. Kelly, Esq. Certified
Montstream & May
Attorneys at Law
P.O. Box 1087
Salmon Brook Corporate Park
Glastonbury, CT 06033

Mr. Dale R. Rizzi Certified
12 Brook Road
Lancaster, NY 81702

CERTIFICATE OF SERVICE (Con't)

Scott Wilson Williams, Esq. Certified
P.O. Box 269
Bridgeport, CT 06601

Ms. Carol A. DeDeo, Esq. Certified
Associate Solicitor
U.S. Department of Labor
Suite S-4325
200 Constitution Avenue, N.W.
Washington, DC 20210

Mr. Richard V. Robilotti
District Director
OWCP-Longshore Division
201 Varick Street
New York, NY 10014

Mr. Thomas C. Hunter, District Director
OWCP-Longshore Division
Room 578
230 South Dearborn Street
Chicago, IL 60604

Judge David DiNardi
US Department of Labor
Room 507
John W. McCormack
Post Office and Courthouse
Boston, MA 02109

No. 95-3034

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dale R. Rizzi,	:	
Petitioner,	:	
	:	
v.	:	On Appeal from an
	:	Order of the United
Underwater Construction	:	States Department of
Corporation, et al.,	:	Labor Benefits Review
Respondents.	:	Board

Decided and Filed May 21, 1996

Before: MERRITT, Chief Judge; CONTIE and BOGGS, Circuit Judges.

MERRITT, Chief Judge. This case raises the question whether a reservoir fed by a navigable waterway is itself part of the waterway under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950. Claimant, Mr. Rizzi, appeals the Benefits Review Board's reversal of the Administrative Law Judge's grant of benefits under the Act. He is an underwater diver who was on assignment in Ohio as an employee of the Underwater

Construction Corporation. While in Ohio working at the Champion Paper Factory, Mr. Rizzi was severely injured on the job. He suffered a stroke which his doctors attributed to his diving.

The Administrative Law Judge granted benefits under the Act, holding that the reservoir or tank in which the defendant was working, which was located underneath the Champion Factory adjacent to the Great Miami River, was a navigable waterway so as to fulfill the jurisdictional requirement of the Act that the injury occur on a navigable waterway. The Administrative Law Judge also held that the claimant's work was maritime employment.

The ALJ held alternatively that even if the reservoir under the Champion Paper Factory did not qualify as navigable, the claimant could still be found to be a maritime employee within the so-called "twilight zone" between coverage under the Act for injuries or deaths upon the navigable waters of the United States (or an adjoining area) and the states' concurrent jurisdiction over land-based injuries.

The Benefits Review Board reversed the ALJ, and held that claimant's injury did not occur on a navigable waterway. Mr. Rizzi appeals from that reversal. We affirm the Benefits Review Board.

FACTS

Mr. Dale Rizzi, 33, is a Navy trained SCUBA diver who, upon his honorable discharge from the Navy in

September, 1986, was hired as a diver for the Underwater Construction Company located in Essex, Connecticut. The employer specializes in construction and repair of power plants, marinas, and other facilities located on the water, which require underwater access and the services of underwater divers. The claimant first worked in Connecticut, building steel drums in channels that ran underneath a power plant situated on the banks of a river. He was then assigned to work in Hamilton, Ohio at a Champion International plant which manufactured paper.

The Champion Plant was located on the banks of the Great Miami River, and water from the Great Miami was used in the paper making process. There was a 100' x 100' x 15' reservoir or tank underneath the plant which was used in the paper making process. Water flowed into this reservoir through underwater intake and out take pipes from the Great Miami River. The claimant's job was to dive underwater and clear the silt and other debris which accumulated in the tank or reservoir using a cast iron pump. He spent an average of four hours a day in the water, and when not in the water, he monitored the other diver.

On the morning of the injury, the claimant began work at 7:30 a.m. Shortly after that, he developed a headache. He suspected carbon monoxide poisoning, but a check of his air supply revealed no problems. The headache worsened and he started to climb up the ladder to get out of the water but started to regurgitate while still wearing his air helmet, causing himself to inhale his own vomit.

He was transported to the hospital where he remained

until May 1987. He was diagnosed with having suffered a stroke, caused by his work as a diver.

ANALYSIS

Navigable Waterway

The benefits Review Board must affirm the findings of fact and conclusions of law of the Administrative Law Judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3). In order to establish that he is entitled to benefits under the Act, the claimant must establish that he was injured while in a place covered by the Act, and while in maritime employment as defined in the Act. *Williams v. Director, Office of Workers' Compensation Programs*, 825 F.2d 246 (9th Cir. 1987). To meet this so-called "situs" test, claimant could have shown either (1) that the tank or reservoir that he was in at the time of his injury was a navigable waterway of the United States, or (2) that the tank or reservoir was used for loading, unloading, repairing, or building a vessel. *Williams, supra*; 33 U.S.C. § 903(a).[1]

---

1 Section 903(a) provides:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the

A threshold requirement of navigability under the cases is the presence of an "interstate nexus" in order for a body of water to function as a continuous highway for commerce between ports. *Lepore v. Petro Concrete Structures, Inc.*, 22 BRBS 403 (1990) (citing *The Monletto*, 78 U.S. 411 (11 Wall.) (1871)). In addition, the waterway must be capable of floating logs, boats and rafts. *Ne-Bo-Shone Ass'n, Inc. v. Hogarth*, 7 F. Supp. 885 (W.D. Mich. 1934), *aff'd* 81 F.2d 70 (6th Cir. 1936).

The Administrative Law Judge correctly found that the Great Miami River, on which the paper plant in this case was located, was a navigable waterway. He went on to find that

> . . . although Claimant was not directly in the Great Miami River, he was within a channel of water which flowed from the Great Miami River through this Champion International reservoir underneath its factory and then back into the [Great Miami River]. Waters running through diversion tunnels have long been held to be still navigable waterways for purposes of the Longshore and Harbor Workers' Act. *See Morrison-Knudson Company v. O'Leary*, 288 F.2d 542 (9th Cir. 1961) (an artificial tunnel used solely to divert the Snake River during construction of a dam was held to be navigable waters.) Waterways which involved

---

navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

> diversion from river channels into factories and back to the main river have also been considered navigable waterways under the Act. *See C.J. Montag and Sons, Inc., v. O'Leary*, 304 F. Supp. 188 (D.C. Or. 1969) (A "tailrace" or "stream" formed by water returning to the Willamette River after it had been diverted for use in the manufacturing plant was held to be a navigable river).

J.A. at 24.

The Board rejected the ALJ's reliance on the *Morrison-Knudson* and *C.J. Montag and Sons* cases, noting that both cases involved the navigability of artificial waterways that could be navigated by boats or barges. In *Morrison-Knudson Co. v. O'Leary*, 288 F.2d 542 (9th Cir. 1961), four workers were killed in a diversion tunnel of the Snake River. The court held that the water in the tunnel, constructed to carry the main stream of the river during construction of the dam, remained a navigable waterway that could float boats or barges. In *C.J. Montag and Sons, Inc.*, 304 F. Supp. 188 (D. Or. 1969), a worker was killed in the tailrace of the Willamette River, which was a stream formed by water returning to the river after it had been diverted to two manufacturing plants. The court in that case held that the tailrace was navigable by barges up to 130 feet long and 28 feet wide operated in the tailrace.

The Board also based its reversal of the ALJ's decision on *Lepore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990). That case involved a claimant who was injured in a pontoon boat in a flume while removing a

temporary support structure from below the concrete base laid for the construction of the Winter Garden building of the World Financial Center at Battery Park in New York City. The flume was a 60' x 30' channel with landfill on the bottom, a concrete slab on top, earth at one end and seawall at the other end. The water in the flume was 20' to 25' deep, and it seeped in through the gravel and rock base. In *Lepore*, the Board held that since water seeped into the flume solely for the purpose of facilitating heating and cooling, and not for navigation, it was not a navigable waterway since it could not support commerce. *Lepore* at 406.

According to the Board, the facts of Mr. Rizzi's claim are similar to those in *Lepore*. As in *Lepore*, the area which held water where the injury occurred was intended primarily for storage of the water for the heating and cooling system. Just as in *Lepore*, the reservoir or tank at issue in this case was tantamount to being land-locked since no vessel could gain access to it due to the walls surrounding it. We agree with the Board that a navigable waterway ends where underground pipes and vents remove water from a river to a reservoir or tank for manufacturing or storage purposes. Otherwise, river water pumped into municipal reservoirs and similar facilities would continue to be viewed as navigable waters even though transportation is no longer possible. Like drains and small creeks, such reservoirs are too far removed from navigation to be any longer considered "navigable waterways", even under a liberal construction.

The claimant argues that the decision of the Benefits Review Board inappropriately substituted its own factual findings for those made by the Administrative Law Judge,

but we conclude that the Benefits Review Board's decision was not premised upon the substitution of factual findings made by the ALJ, but rather was premised upon the fact finder's misapplication of the law to the facts. The Board's reversal of the ALJ's decision and order rests upon its finding that the site of the claimant's injury did not constitute navigable waters as covered by 33 U.S.C. §902(3). There was no retrial of facts by the Board, nor was there any substitution of facts for the finding of the Administrative Law Judge.

Maritime Employee

In addition to establishing injury on actual navigable waters, a claimant may also establish coverage if his injury occurs in a landward area covered by Section 3(a) and his work is maritime in nature, bringing him within the definition of maritime employee in Section 2(3). See 33 U.S.C. §§ 902(3), 903(a). Section 3(a) provides that the injury must occur on the navigable waters of the United States "including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading repairing, dismantling or building a vessel." 33 U.S.C. §903(a).

In its decision reversing the ALJ, the Board stated:

> . . . in addition to not constituting "navigable waters", the site at the paper factory where claimant was injured is not one of the enumerated sites in Section 3(a), and there is not contention that it is an

> adjoining area used for the maritime activity of loading, unloading, building, dismantling or repairing vessels. Therefore, we hold that claimant's injury did not occur on a situs covered under Section 3(a) of the Act. . . . Accordingly, as the situs requirement is not satisfied in this case, we reverse the Administrative Law Judge's finding that claimant's injury on January 20, 1987 is covered under the Act and the resultant award of benefits.

J.A. at 46.

We agree that the claimant's injuries did not occur upon a navigable waterway, pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel as specified in 33 U.S.C. § 903(a). The Board was therefore correct in finding as a matter of law that the claimant's injuries failed to meet the jurisdictional requirements of the Act.

Twilight Zone

Mr. Rizzi also argued that his injury occurred in the "twilight zone" between state workers' compensation and the Federal Act. He claimed that where an injured claimant is not eligible for state compensation benefits, he may be afforded LHWCA coverage despite not meeting all of the technical requirements under the Act. *See Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360 (5th Cir. 1995).

The Board did not address the claimant's "twilight

zone" argument, except in a footnote stating: "[i]n its brief to the Board, employer states that claimant received an award of benefits under Connecticut workers' compensation law, which employer ultimately did not challenge." J.A. at 46. Because the petitioner qualified for and secured workers' compensation benefits under the Connecticut Workers' Compensation Act, band because the petitioner has failed to meet the situs requirement for longshore jurisdiction, there is not justification for extending the Act's jurisdictiсn beyond that mandated by the statute.

CONCLUSION

For the reasons discussed above, the Board was correct in reversing the judgment of the Administrative Law Judge awarding benefits to Mr. Rizzi under the Longshoremen's and Harbor Workers' Compensation Act. We therefore AFFIRM.